United States Court of Appeals

for the Second Circuit

JOINT APPENDIX

ORIGINAL
WITH PROOF
OF SERVICE

76-6191

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

B

P/S

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff-Appellee-Appellant,

and

JOSEPHINE McGEE,

Plaintiff-Intervenor-Appellee-Appellant,

- against -

KALLIR, PHILIPS, ROSS, INCORPORATED,

Defendant-Appellant-Appellee.

ON APPEAL FROM THE FINAL ORDER AND JUDGMENT
OF THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

UNITED STATES COURT OF APPEALS
FILED
FEB 24 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

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PAGINATION AS IN ORIGINAL COPY

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BEST COPY AVAILABLE

Docket Entries

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CIVIL DOCKET
UNITED STATES DISTRICT COURT

JUDGE WEINFELD

Jury demand date:

74 CIV. 3234

C. Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION V KALLIER, PHILIPS, ROSS, INC., a New York Corporation	For plaintiff: Ronald Copeland 26 Federal Pl. Rm.1615,N.Y. 10007 264-3643 For defendant: Davis,Gilbert,Levine and Schwartz 500 5th Ave,NYC 10036 564-3530

STATISTICAL RECORD	COSTS		DATE	NAME OR RECEIPT NO.	REC.	DISB.
S. 5 mailed x	Clerk					
S. 6 mailed ✓	Marshal					
asis of Action: Civil Rights	Docket fee					
	Witness fees					
tion arose at:	Depositions					

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION V. KALLIER, PHILIPS, ROSS, INC.

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74 CV. 323

DATE	PROCEEDINGS	Date Order or Judgment No.
Jul 26-74	Filed Complaint and issued summons.	
ug. 9-74	Filed defts. ANSWER to complaint.	DGL&S
ug. 9-74	Filed sumons with marshal's return. Served on: John Kallir by Mr. Ross on 7/30/74	
ep.3-74	Filed defts. 1st set of interrog. to pltf.=	
[illegible]	Filed plaintiff's first set of interrog. to deft.	
[illegible]	Filed plaintiff's answers to deft's first set of interrog.	
Dec.11-74	Filed movant Josephine McGee OSC--ORDERED that deft. show cause in Rm.905 on Dec. 17,1974 at 2:15pm why an order should not be made granting intervention as amended on the ground that the movant is a party that may be affected by the outcome of these proceedings and further granting a prel. injunction enjoining deft. ,etc.; ORDERED that personal service of all copies be made upon defts. attys. by Dec.10,1974 .Weinfeld,J.	
Dec.17-74	Filed pltfs. affdt. and notice of motion for a prel.injunction requiring deft. to reinstate Josephine McGee to her position etc.(ret. on a date to be fixed by the court)	
Dec.17-74	Filed pltfs. memoronadum of law in support of motion for prel. injunction.	
Dec.17-74	Filed pltfs. reply to to Josephine McGees request to intervene.	
[illegible]	PRE-TRIAL CONFERENCE HELD BY [illegible]	
[illegible]-23-75	Filed defts. answers to plfts. first set of interrog.	
[illegible]-06-75	Filed pltfs. notice of taking deposition of UYJohn Company, Lawrence Hoff, William M. Hubbard and Gerard Thomas on 2-18-75	
[illegible]-75	Filed pltfs. notice of taking deposition of Bernard Shea, Fred Henry, James Penrose [illegible] and Dr. Samuel Stubbs, on 2-18-75	
[illegible]-74	Filed defts. ANSWER to complaint in intervention	
[illegible]-75	Filed affdvt. and order to show cause by deft. for a protective order. -- Also filed 75 Civ. 401 [illegible] Weinfeld, J.	
2-21-75	Filed affdvt. of Thomas A. Holman on behalf of Pltf.--Intervener McGee in opposition to motion for a protective order --and Filed memo. endorsed on deft's order to show on 2-13-75; Motion granted except as to Messers. Shea, Penrose, and Henry, without prejudice to Pltfs. renewal of the application to take the deposition of the executive officers of UpJohn, following the completion of the deposition of Messers. Shea, Penrose, anb Henry --so ordered Weinfeld, J. m/m (filed in 75 401)	
6-05-75	Non-Jury trial begun before Judge Weinfeld.	
6-06-75	trial continued and concluded - decision reserved.	

EQUAL EMPLOYMENT OPPORTUNITY COMM. 2-7 Judge Weinfeld

v

LEVITTER, PHILIPS, ROSS, INC 74 civ. 3234

a NY Corp.

D. C. 110 Rev. Civil Docket Continuation Page 2

DATE	PROCEEDINGS	Date Orde Judgment
0625-75	Filed pltf's post-trial memorandum of law (filed in 75civ 401)	
06-25-75	Filed pltf's post trial brief	
07-31-75	Filed trial memorandum (filed in 75civ 401)	
07-31-75	Filed post trial brief. (filed in 75civ-401)	
07-31-75	Filed pltf's Joint trial memorandum (filed in 75civ-401)	
07-31-75	Filed OPINION # 42888 (after trial) for reasons stated herein the the Court finds that defts. acts were in viol. of Sec. 704(a) of title V11 and that pltf. and EEOC are entitled to judgment as indicated. The foregoing, together with the parties stipulation of facts, shall constitute the Court's findings of fact and conclusions of law.. Submit order in accordance with the foregoing--Weinfeld J. (filed in 75civ-401-) m/n	
08-6-75	Filed transcript of record of proceedings dated June 5, 6, 1975	
08-19-75	Filed pltf. Intervenor affdvt. and notice of motion for an order pursuant to rule 58 setting the opoinion and for such other relief. ret. 8-26-75.	
09-18-75	**Filed pltf's memorandum in support of pltf -Intervenor's proposed order**	
10-07-75	Filed	
12-29-75	Filed transcript of record of proceedings dated 9-30-75	
01-09-76	**Filed deft's answers to pltfs interrog.**	
02-10-76	Filed Transcript of record of proceeding dated 2-10-76	
03-01-76	Filed transcript of record of proceedings dated 2-18-76	
03-09-76	Filed proceedings of hearing before Mag: Hartenstine dated 2-17-76	
03-17-76	Filed transcirpt of proceedings taken before Mag. Hartenstine on 2/25/76.	
05-24-76	Filed pltf's post-hearing memorandum on computation of damages.	
7-30-76	Filed memorandum ordering that motion be x referred to Mag. Schreiber. Conner, J. (also see 74Xx 75 Civ. 40)	
[illegible]	[illegible] proposed findings of fact and conclusions of Law.	
09-01-76	**Filed copy of Magistrate Schreiber's determination of damagews.**	
10-08-76	Filed Original report of Magistrate Schreiber dated 8-31-76.	
10-08-76	Filed Pltf-Intervenor's memorandum	
10-08-76	Filed pltf's reply to deft's post-hearing memorandum with respect to computation of damages.	
10-08-76	Filed defts comments in opposition to Magistrate's determination of damages.	
10-08-76	Filed defts post-hearing memorandum with respect to computation of damages.	
10-08-76	Filed OPINION #45225.. Findings of Fact and Conclusions of Law: The plaintiff is entitled to Judgment in the amount of $88,793.48, plus 6% interest payable quarterly. Judgment may be entered accordingly. -- Weinfeld, J. m/n	
11-15-76	Filed pltfs certificate of service of proposed order and judgment (For both cases: 74-3234 and 75-401)	
11-15-76	Filed Judgment and order #77,020 it the sum of $94,978.98 in favor of pltf. McGee and against deft. Ordered that pltf. may upon notice to deft. apply for allowance of attorneys fees incured by her. Any other relief requested by pltf. is denied. Costs to be taxed. -- Weinfeld, J. JUDGMENT ENTERED - CLERK. m/n	
11-24-76	**Filed pltf McGees supersedeas Bond - Undertaking on appeal in the sum of $105,698.87 -- Insurance Co. of North America.**	
12-03-76	Filed defts notice of appeal to the USCA for the 2nd Circuit from judgment entered on 11-15-76 m/copy	

77 CV 3237 EW a-8

Equal Employment Opportunity Comm. p. 4

vs. Josephine McGee

DATE	PROCEEDINGS	Date Order Judgment N
1-10-77	Filed Notice of Appeal by Equal Employment Opportunity Commission notice of cross-appeal to the U.S.C.A. for the 2nd Circuit from order of 11-15076. m/n and copies to atty's.	
2-24-77	Filed Certification of record on appeal	

A-1

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	)	
v.	)	Civil Action No.
KALLIR, PHILIPS, ROSS, INC., a New York Corporation, Defendant.	)	COMPLAINT

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Sections 451, 1343 and 1345. This is an action authorized and instituted pursuant to Section 706(f)(1) and (3) and (g) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e et seq. (Supp. II, 1972), hereinafter referred to as "Title VII."

2. The unlawful employment practices alleged below were and are now being committed within the State of New York and the Southern District of New York.

PARTIES

3. Plaintiff, Equal Employment Opportunity Commission, (hereinafter, the "Commission"), is an agency of the United States of America charged with the administration, interpretation and enforcement of Title VII and is expressly authorized to bring this action by Section 706(f)(1), 42 U.S.C. Section 2000e-5(f)(1).

4. Since at least July 2, 1965, Defendant, Kallir, Philips, Ross, Inc. (hereinafter, the "Company") has continuously been and is now a New York corporation, doing business in the State of New York and City of New York, where it is engaged in the business of conducting an advertising agency advertising products which are shipped across state lines and has continuously and does now employ more than twenty-five employees.

5. Since at least July 2, 1965, the Company has continuously been and is now an employer engaged in an industry affecting commerce within the meaning of Section 701(b), (g) and (h) of Title VII, 42 U.S.C. Section 2000e-(b), (g) and (h).

STATEMENT OF CLAIM

6. More than thirty (30) days prior to the institution of this action, charges were filed with the Commission alleging that the Company had engaged in unlawful employment practices under Title VII.

7. The Commission, after investigating and finding reasonable cause to believe that the Company had engaged in unlawful employment practices, has been unable, through informal methods of conference, conciliation and persuasion, to secure a conciliation agreement acceptable to it.

8. On or about March 26, 1973 and continuing up until the present time the Company has intentionally engaged in unlawful employment practices at its New York facility in violation of Section 704(a) of Title VII, 42 U.S.C. Section 2000e-3(a). Such unlawful employment practices include, but are not limited to the following:

A. The suspension of at least one employee in retaliation for her opposition to certain practices of Defendant, claimed to have been an unlawful employment practice under Title VII and for her institution of a proceeding under Title VII.

B. The discharge of at least one female employee in retaliation for her having made a charge of employment discrimination with the Commission under Title VII.

PRAYER FOR RELIEF

WHEREFORE, the Commission respectfully prays that this Court:

A. Grant a preliminary and permanent injunction enjoining the Company, its officers, agents, employees, successors, assigns

and all persons in active concert or participation with it from engaging in any employment practice which discriminates against any employee on account of that employee's opposition to practices which have been made unlawful employment practices by Title VII or on account of that employee's having made a charge of employment discrimination against the Company under Title VII.

B. Order the Company to make whole those persons adversely affected by the unlawful employment practices described above, by providing appropriate back pay, with interest, in an amount to be proved at trial and other affirmative relief necessary to eradicate the effects of the Company's unlawful employment practices.

C. Grant such further relief as this Court deems necessary and proper.

D. Award the Commission its costs in this action.

Respectfully submitted,

WILLIAM A. CAREY
General Counsel

WILLIAM L. ROBINSON
Associate General Counsel

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
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Assistant Regional Attorney

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[215]-597-0881

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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and JOSEPHINE McGEE

Plaintiffs

v.

KALLIR, PHILIPS, ROSS, INC. a New York Corporation,

Defendant

COMPLAINT IN INTERVENTION

CIVIL ACTION NO
74 Civ. 3234 (E.W.)

JURISDICTION AND VENUE

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1343.

2. This is an action authorized and instituted pursuant to §706 (f) (1) and (3) and (g) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. (Supp. II, 1972), hereinafter referred to as Title VII."

3. The unlawful employment practices alleged below were and are now being committed within the State of New York and the Southern District of New York.

PARTIES

4. Plaintiff Josephine McGee is a female citizen of the United States of America, and is a resident of the City, County and State of New York, United States of America, and is a person aggrieved by unlawful employment practices by the defendant.

5. Since at least July 2, 1965, Defendant, Kallir, Philips, Ross, Inc., has continuously been and is now a New

York Corporation, doing business in the State of New York and City of New York at 919 Third Avenue, New York, New York, where it is engaged in the business of conducting an advertising agency, advertising products which are shipped across state lines and has continuously and does now employ more than twenty-five employees.

6. Since at least July 2, 1965, the Company has continuously been and is now an employer engaged in an industry affecting commerce within the meaning of Section 701(b), (g) and (h) of Title VII, 42 U.S.C. Section 2000e-(b), (g) and (h).

STATEMENT OF CLAIM

7. The following practices, policies, customs and usages made unlawful by Title VII were maintained by the Defendant at the times herein alleged.

8. Plaintiff, Josephine McGee, a female, was hired by the Defendant, its agents, servants and employees, on May 15, 1967, as an Administrative Assistant at a salary of $8,000.00 per annum.

9. Plaintiff, Josephine McGee, received various promotions and salary increases, and at the time of her discharge she was a Senior Account Executive, earning $18,000.00 per annum.

10. On or about March 26, 1973 and continuing up until the present time the defendant has intentionally engaged in unlawful employment practices at its New York facility in violation of Section 704(a) of Title VII, 42 USC Section 2000e-3(a). Such unlawful employment practices include, but

are not limited to the following:

A. The suspension of plaintiff Josephine McGee in retaliation for her opposition to certain practices of Defendant, claimed to have been an unlawful employment practice under Title VII and for her institution of a proceeding under Title VII.

B. The discharge of Plaintiff Josephine McGee in retaliation for her having made a charge of employment discrimination with the Commission under Title VII.

11. Plaintiff further alleged that she lost wages and fringe benefits from the period commencing March 26, 1973 due to the aforesaid unlawful suspension in the amount of $100,000.00.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff McGee respectfully prays that this Court:

A. Grant a preliminary injunction and permanent injunction enjoining the Defendant, its officers, agents, employees, successors, assigns and all persons in active concert or participation with it from engaging in any employment practice which discriminates against Josephine McGee on account of her opposition to practices which have been made unlawful employment practices by Title VII or on account of her having made a charge of

employment discrimination against the Defendant under Title VII, or which limits, segregates, or classifies Plaintiff McGee in any way which would deprive or tend to deprive her of employment opportunities or otherwise adversely affect her status as an employee because of her sex.

B. Order the Defendant to make whole Josephine McGee adversely affected by the unlawful employment practices described above, by providing her appropriate back pay, with interest, in an amount to be proved at trial and other affirmative relief necessary to eradicate the effects of the Defendant's unlawful employment practices.

C. Grant such further relief as this Court deems necessary and proper.

D. Award the Plaintiff McGee her costs in this action.

E. Award Plaintiff McGee her attorney fees in this action.

F. Award Plaintiff McGee punitive damages in the amount of one million dollars ($1,000,000.00)

Respectfully submitted,

THOMAS A. HOLMAN, ESQ.

O'DWYER & BERNSTIEN
Attorneys for Plaintiff-Intervenor
Josephine McGee
63 Wall Street
New York, New York
(212) 269-3939

Answer

A-8

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, -against- KALLIR, PHILIPS, ROSS, INC., Defendant.	Judge Weinfeld 74 Civ. 3234 ANSWER

Defendant, Kallir, Philips, Ross, Inc., by its attorneys, Davis, Gilbert, Levine & Schwartz, for its answer to the complaint:

1. Admits the allegations in paragraph "1".

2. Denies each and every allegation contained in paragraph "2".

3. Admits the allegations in paragraph "3", except denies that the Commission is charged with the interpretation of Title VII.

4. Admits the allegations in paragraph "4".

5. Admits the allegations in paragraph "5".

6. Admits the allegations in paragraph "6".

7. Denies each and every allegation contained in paragraph "7".

8. Denies each and every allegation contained in paragraph "8".

WHEREFORE, defendant Kallir, Philips, Ross, Inc.

demands judgment dismissing the complaint together with the costs and disbursements of this action.

Dated; New York, New York
August 7, 1974.

DAVIS, GILBERT, LEVINE & SCHWARTZ

By: _____

A Member Of The Firm.
Attorneys for Defendant

Answer to Complaint in Intervention

A-10

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and JOSEPHINE McGEE, Plaintiffs, -against- KALLIR, PHILIPS, ROSS, INC., a New York Corporation, Defendant.	Judge Weinfeld Civil Action No. 74 Civ. 3234 ANSWER TO COMPLAINT IN INTERVENTION

Defendant, KALLIR, PHILIPS, ROSS, INC. answering the complaint in intervention by its attorneys DAVIS, GILBERT, LEVINE & SCHWARTZ says:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 of the complaint in intervention.

2. Admits the allegations contained in paragraph 5 of the complaint in intervention.

3. Denies the allegations contained in paragraph 6 of the complaint in intervention.

4. Admits the allegations contained in paragraph 8 of the complaint in intervention.

5. Admits the allegations contained in paragraph 9 of the complaint in intervention.

6. Denies the allegations contained in paragraph 10 of the complaint in intervention.

7. Denies the allegations contained in paragraph 11 of the complaint in intervention.

WHEREFORE, defendant demands judgment dismissing the complaint

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an intervention together with the cost of this action.

Dated: New York, New York
January 29, 1975

DAVIS, GILBERT, LEVINE & SCHWARTZ

By _____

A Member Of The Firm.
Attorneys for Defendant
500 Fifth Avenue
New York, New York 10036
(212) 564-3530

TO:

O'DWYER & BERNSTEIN
Attorneys for Plaintiff-Intervenor
Josephine McGee
63 Wall Street
New York, New York

Plaintiff's Exhibit No. 5, Letter from Phyllis Korzilius

A-12

MEDICINE...
DESIGNED FOR HEALTH...
PRODUCED WITH CARE

this letter is from Phyllis Korzilius of Upjohn & the M & C Commission - The Boston Law Firm has a copy. Jan Spencer

THE UPJOHN COMPANY

KALAMAZOO, MICHIGAN 49001
TELEPHONE (616) 382-9000

March 8, 1973

To Whom It May Concern:

I have been working with the Kallir-Philips-Ross agency and Josie McGee since 1969. She is the only member of the original account group who remains on the Upjohn account. The assets that derive to her from this continued client relationship are:

1. knowledge of the client personalities
2. familiarity with client policies and attitudes

Beyond this she has personal assets which are essential to a good client/agency relationship:

1. she has the ability to develop immediate rapport with client personnel
2. she is extremely efficient in her handling of day-to-day account matters
3. her contact reports are clear, comprehensive, but to the point, and always promptly executed
4. she is extremely cooperative in creative/media arguments, but firm in presenting the agency's rationale
5. as a member of the client's product marketing teams (all marketing strategy at Upjohn is planned on a cooperative client/agency basis) she works well with sales/marketing personnel and regularly contributes ideas and comments
6. she makes the client feel--and her actions show it--that she has his best interest at heart. In a democratic sense, she truly functions as the client's representative with the agency.

To summarize: a successful senior account executive must:

1. get along with client personnel
2. translate client marketing objectives clearly to agency creative and media personnel
3. carefully monitor agency creative work and media selection to make sure it meets the client's objective
4. fairly and persuasively present the agency's creative proposals to the client
5. efficiently and promptly handle the details of implementation and follow-up
6. exercise firm control over agency personnel to meet client deadlines

As someone who has worked for four years with Josie McGee, I can honestly say she is a successful senior account executive.

[RETYPED FOR CLARITY]

Plaintiff's Exhibit No. 6, March 26, 1973,
Letter from John Kallir

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11-6

KALLIR, PHILIPS, ROSS, INC. 919 THIRD AVENUE, NEW YORK, N.Y. 10022 (212) 371-1800

March 26, 1973

Miss Josie McGee
Kallir, Philips, Ross
919 Third Avenue
New York, N.Y. 10022

Dear Josie:

The protracted nature of our adjourned hearing before the Human Rights Commission, the course you've chosen to follow by involving various individuals, both on the agency's staff and at Upjohn; and your divisive behavior make it increasingly difficult for us to carry on normal day-to-day activities and provide our client with the service they require.

The Executive Committee of KPR has therefore decided to relieve you of all responsibilities on the Upjohn account and to ask you not to come to our office until further notice. We presently intend to continue your salary. I think you will agree that it would be preferable not to involve any of our clients in this matter.

Sincerely,

John

John Kallir

JK/gc

DX-C DF

3/17/75

Plaintiff's Exhibit No. 7, Staff Memorandum, March 27, 1973

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M E M O R A N D U M

DATE: March 27, 1973

TO: Staff

FROM: John Kallir

As of this date, we have seen fit to grant Josie McGee a leave of absence at full pay. For an indefinite period, therefore, she will not be coming to the office, and we would like you to know why.

On December 15, Josie filed a complaint charging the agency with discrimination on the basis of sex. Of course, the agency has filed a complete rebuttal of these charges. Without going into the details, I think those of you who've worked here for some time will remember when Josie first joined us, not quite six years ago, at a rather modest salary and in a subordinate position. She has had many substantial promotions in the intervening years, since it is agency policy to promote from within, regardless of sex or race. In fact, a significant number of our executives (more than with many of our competitors) are women.

So far, there's been only one fact-finding session in this matter, which was adjourned after three hours, and no decision has as yet been made whether the case warrants a hearing. While these procedures drag on, we saw no reason at first why they should interfere with Josie's role in the agency. Increasingly, though, Josie has taken actions which could prove detrimental to our relationship with Upjohn. The agency-client relationship is so sensitive and dependent on complete mutual trust that we can not allow it to be undermined through divisiveness or personal rancor. Thus, she left us no choice but to act as we did.

A-15

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION & JOSEPHINE McGEE, Plaintiffs	Before: HON. EDWARD WEINFELD, District Judge
vs.	74 CIVIL 3234
KALLIR,PHILIPS,ROSS, INC., a NEW YORK CORPORATION, Defendant.	

New York, June 5,6, 1975

STENOGRAPHER'S MINUTES

cmbr (TR 7)

identification.)

MR. HOLMAN: Your Honor, the plaintiff will call its first witness, Josephine Mc Gee.

THE COURT: Now before you proceed am I correct that the only issue in the case is retalitory conduct, or retaliation?

MR. HOLMAN: Yes, your Honor, that would be correct.

THE COURT: There is no charge of discrimination.

MR. HOLMAN: The charge of discrimination is not being litigated in this court.

THE COURT: All right. Proceed.

J O S E P H I N E M C G E E, plaintiff,

called as a witness, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HOLMAN:

Q Miss Mc Gee, where do you currently reside?

A 309 East 87th Street, New York 10028.

Q Was there ever a time when you were employed by the defendant Kallir, Philips, Ross, Incorporated?

A Yes.

Q And when were you first employed by the defendant?

A May 15, 1967.

Q And at that time your job function with the defendant was what?

A I was hired without any specific position at the time the policy of the company being to hire competent people and have them on staff in order to have them available immediately --

MR. PATTERSON: Your Honor, I must object to this witness' answer at this point relative to the company's policy at that time. I don't know that she is qualified to give it.

THE COURT: Yes, sustained. It wasn't responsive to the question either.

Q Would you --

A So months after I was hired I received the title of administrative assistant to Norman Cooper --

Q What was your salary at that time?

A $8,000 per year.

Q And your functions as an administrative assistant to Mr. Cooper was what?

A I followed up on his work with the client, within the agency, such work as proof reading, following up on production to see that things were correct, that things were done on time. If a particular ad needed,

or if references were used in an ad it was my duty to find a particular medical journal and article to check out referneces, either specific references or paraphrased references to be sure that they were accurate and reflected in the ad. And this would be submitted with a copy to the client and with art work whenever they wanted to improve an ad or submit an ad.

Q Did there come a time when you received a promotion from the defendant from the job as administrative assistant to another job title?

A Yes, in 1968 I became assistant account executive again to Norman Cooper on the Cooper Laboratories account.

Q What was your salary as an assistant account executive?

A $9,000.

Q How long did you remain in that position?

A Until September 15, 1969, I believe, when I became account administrator on the Upjohn Company account.

Q Would you briefly tell the Court what your function were as an assistant account executive for the defendant?

A As an assistant account executive I had more contact with the client itself. I went on trips with Mr. Cooper to the client. I attended meetings. In this position the client would, specifically if Mr. Cooper were

out of the office, would ask me questions, whereas in the position of administrative assistant it would be morelikely to take -- take the questions and submit them to Mr. Cooper for his answer. At this promotion the client would ask me and say would you check on this, would you call us back. You became more exposed to the client.

Q Well, you testified that as an account administrator you received a promotion --

MR. HOLMAN: Withdrawn.

Q You testified that you were promoted to account administrator. What was your salary at that time?

A That was $10,000 and it was account administrator on the Upjohn account.

Q How long were you in that position?

A Until I was discharged -- oh, at that title?

Q Yes.

A I believe in May of 1970 I was promoted to account executive on the Upjohn account.

Q Anddid there --

A With an increase in salary to $12,500 as account executive on the Upjohn account.

Q Did there come a time thatyou were promoted from that position?

A Yes, to senior account executive. Again on the

Upjohn account, in September of 1972. May I -- I am sorry, may I correct the salaries? As senior account executive I was making $18,000. As account executive -- I had a promotion to twelve-five, that is right. It went eight, nine, ten, twelve-five, fifteen, 18,000.

Q Couldyou briefly tell the Court what your functions were as senior account executive for the defendant?

A As a senior account executive your responsibility became much greater. Your responsibility for the work that was produced, your contacts with the client increased tremendously. It became almost daily. You attended meetings, you attended client meetings, you worked on marketing plans, you supervised media programs which are the advertising placed in professional journals for particular products. And in general you would be -- see that work turned out by the agency reflected what the client had requested or needed.

Q Who was your immediate supervisor as a senior account executive with the defendant?

A J. Lilker.

Q And during the entire period that you remained as a senior account executive Mr. Lilker was your immediate supervisor?

A Yes.

Q I believe you testified your salary as a senior

account executive was 18,000.

A That is right.

Q What were your benefits in addition to salary?

A Blue Cross --

Q That you received from the defendant.

A Blue Cross, Blue Shield, major medical, pension plan, profit sharing, annual review of salary, bonuses, sick days, personal days. All paid for.

Q Were these the benefits that you recall?

A All the monetary benefits by working there you weren't supposed to own medical insurance and you were kept up-to-date on -- you know, on how the profession was changing.

Q Do you recall whether a group life accident death group insurance was available to you?

A Yes. Life, accident, disability, that is true.

Q Did there come a time, Miss Mc Gee, when you requested a promotion, an increase in salary from an officer of the defendant?

MR. PATTERSON: Your Honor, I will object. The witness is being led and has been for some time and I haven't said anything but I think we are getting down to the heart of the issue and I think the witness should be permitted to testify.

THE COURT: I don't understand your objection to that question. What is the objection, Mr. Patterson?

MR. PATTERSON: I believe the question is leading, your Honor.

THE COURT: I will allow it even though it is leading.

A Do you want me to answer?

Q Yes, if you would.

A Yes, there came a time in December of '72 when I requested a meeting with Mr. Kallir to discuss an increase in salary to ... me parity with male senior account executives.

Q When did you meet with Mr. Kallir?

A December 4, 1972.

Q What connection is there between Mr. Kallir and the defendant Kallir, Philips. Ross, Incorporated?

A He is president of the agency. He was at that time. And he was also management supervisor on the Upjohn account.

Q And that was the account that you were working on?

A Yes.

Q Where did this meeting take place with Mr. Kallir?

A In Mr. Kallir's office.

Q Can you tell the Court what you said to him on that occasion?

A Not verbatim. I knew I was going into -- I had learned the salary of one of the male senior account executives and --

Q Who was that?

A Mr. Ed Holland, who worked on the Mc Neil Laboratories account, and who I had been told was earning $25,000 per year.

Q And did --

A And this was the purpose of my requesting the meeting with Mr. Kallir.

Q Did you convey this information to Mr. Kallir?

A Yes, but I don't specifically -- I can't specifically recall in which way but I knew I was discussing parity and not a raise.

Q Did you bring anything else to Mr. Kallir's attention, that you now recall?

A Yes, the law regarding -- it was in a booklet from the New York City Commission on Human Rights. The law on equal pay for equal work. And parity.

Q Was there anything else thatyou said to Mr. Kallir?

A We discussed the --

THE COURT: What was said on that occasion by him and what was said by you? To the best of your recollection.

THE WITNESS: I remember that I said I had been told that Ed Holland had -- was receiving this amount and Mr. Kallir did not deny it. And then a discussion began to why he would receive such an amount, and I didn't, since I was on the second largest billing account in the agency. And was again handling that. I believe it got into a general discussion, and during that discussion a marketing plan was discussed, a marketing plan, a plan usually presented by an agency, sometimes the client, as to recommended programs for the forthcoming year.

Q When you say marketing plan was discussed, do you mean that he asked you to prepare one or --

A Yes, I -- to the best of my recollection Mr. Kallir asked me to prepare a marketing plan to see whether I was prepared to -- well, that I would be ready to receive this amount of salary.

Q Did he indicate to you how he was going to act upon your request?

A I do not recall that. As to his saying I would discuss it with someone? No, I don't remember anything like that.

Q Approximately how long did this meeting with Mr. Kallir last?

A About an hour.

Q Did you take any action after this meeting took place relative to the meeting?

A I wrote a memo to Mr. Kallir on December 8th of '72.

Q Miss Mc Gee, I show you a carbon copy of a memorandum and I ask if you can identify the memorandum (handing).

A Yes, this is the one I sent to John Kallir, with copies to Warren Ross and Jerry Philips, who were the other principals in the agency.

MR. HOLMAN: Your Honor, at this time I would like to offer as Plaintiffs' Exhibit No. 2 the memorandum from Josephine Mc Gee to John Kallir, dated December 8, 1972.

THE COURT: Show it to Mr. Patterson, please.

MR. PATTERSON: I have no objection, your Honor. I have the original in my possession if the Court would prefer that be offered.

THE COURT: The copy may be received.

xx (Plaintiffs' Exhibit 2 was received in evidence.)

BY MR. HOLMAN:

Q Did there come a time, Miss Mc Gee, when you --

THE COURT: I assume that you offered it in evidence because you want the trier of the facts to read it,

don't you? I can't read it if you follow up so quickly.

MR. HOLMAN: Yes, your Honor.

THE COURT: Now, we will have to suspend for a moment. I have a note from the jury in this other case.

(Recess.)

THE COURT: What was the last question, please, and answer?

(Record read.)

BY MR. HOLMAN:

Q Miss Mc Gee, did there come a time when you received any response to your memorandum of December 8, 1972?

A I received a memo dated December 13, 1972 from John Kallir, yes.

Q Miss Mc Gee, I show you a memorandum and I ask you to identify it.

(Handing to witness.)

A Yes, that is it, with copies to the same people.

Q This is the memorandum that you have just made reference to of December 15, 1972?

A Yes.

Q And you sent this memorandum to Mr. Kallir?

A He sent that to me.

Q I am sorry.

THE COURT: That is a response to her letter.

MR. HOLMAN: Yes, sir. And copies were sent to Mr. Ross and Mr. Philips.

Your Honor, at this time I offer this memorandum as Plaintiffs' Exhibit No. 3.

MR. PATTERSON: No objection, your Honor.

(Plaintiffs' Exhibit 3 was received in evidence.)

MR. HOLMAN: Your Honor, on your copy there would be a filing stamp of the Commission that I am going to X out. It doesn't appear on the copy we have just made reference to.

MR. PATTERSON: I have no objection to that, your Honor.

THE COURT: Do you have an extra copy of that, too? I want a copy of each of the exhibits. I don't want the original.

All right. Proceed, please.

BY MR. HOLMAN:

Q Miss Mc Gee, prior to December 13th and subsequent to December 4, 1972 did you have any conversation with Mr. Kallir relative to your meeting of December 4th?

A No, I do not.

Q Did you take any action as a result of receiving

the memorandum dated December 13, 1972 from Mr. Kallir?

A Yes, I did.

Q And what action did you take?

A I filed a charge of sex discrimination with the New York City Commission on Human Rights on December 15th.

Q Now I show you, Miss Mc Gee, a copy of a document bearing a signature and I ask you to identify the document (handing).

A Yes.

Q Can you identify the document to the Court?

A Yes.

Q What is that document?

A It was the form I filled out on December 15th down at the New York City Commission on Human Rights.

Q Does your signature appear at the bottom of the second page?

A Yes. Twice.

MR. HOLMAN: Your Honor, at this time I offer Josephine Mc Gee's charge before the Commission, rather the complaint of Josephine Mc Gee to the Commission on Human Rights of the City of New York as Plaintiffs' Exhibit No. 4.

MR. PATTERSON: No objection, your Honor.

THE COURT: Received.

Q Do you recall, Miss Mc Gee, the names of the individuals at the New York City Commission for Human Rights who you have had conversations with subsequent to December 15, 1972?

A I only remember Mr. Arnold Loperena, who I believe was the investigator. There were other people that I spoke to at the Commission but I don't remember their names.

Q When did you first meet with Mr. Loperena?

A I believe that was in January 1973 at the offices, and I believe the purpose of that was to tell me he was the investigator and would be the one that I would give the details of case to.

Q Now, subsequent to that meeting with Mr. Loperena did you have occasion to meet with him after that?

A Between then and March of the same year I would say I met with Mr. Loperena about five times or less. At lunch time in a restaurant.

Q And what did you discuss with Mr. Loperena during those five occasions that you have just made refernece to?

A The functions of an advertising agency, and in particular a pharmaceutical advertising agency which operates under so many government regulations. Most people aren't aware of this, and he felt the background was needed.

Then we got more specific since it was a case of one female senior account executive. The definition of that particular job was gone into as often and as deeply as possible. And as I recall Mr. Loperena asked me to give him some sort of a job description forthe file which I believe I did. He wanted, I think something more since quite often as you can hear so many of the activities become automatic, you are not aware of what you are doing. I didn't feel I could get an objective job evaluation from Mr. Kallir, and we discussed, I believe, I don't know at what point, that the client might be able to fill out, flush out the description of a senior account executive.

Q When you make reference to a client --

A The Upjohn Company. Someone at the client.

Q In other words, a client of the defendant Kallir, Philips, Ross, Incorporated?

A Yes, the client on which I was serving as senior account executive. That their perception of the job might be of assistance to the Commission since it would be the other side of the table.

Q During that period of time, I refer to December 15, 1972, were you aware of any contact between the New York City Commission and the defendant Kallir, Philips, Ross, Incorporated?

A No, I was not.

Q Well, did there come a time, Miss Mc Gee, when the New York City Commission held a conference of some kind?

A At which I was present?

Q At which you were present, yes.

A Yes, there was a conference. I don't know whether it was a hearing. It was March 13, 1973.

Q Who was present at that conference?

A Mr. Kallir, Mr. Norman Cooper, their attorney, Mr. Ted Kaufman, Mr. Loperena, the woman who presided, again I don't remember her name. I think it was Miss Morales and of course myself.

Q Can you briefly tell the Court what took place at that conference of March 13, 1973?

A I had been prepared, or I had been told by Mr. Loperena, or someone in the Commission that these first hearings usually were very brief so I was expecting a half hour. When I went into the room I was -- well it was at a very small table. Mr. Kaufman was directly to my left, closer than the Judge is here, and Mr. Kallir was to his left and Mr. Cooper was at the end of the table which could not have been larger than seven or eight feet. Mr. Loperena was opposite Mr. Cooper and -- well the woman,

Mrs. Morales, I will call her, was opposite John Kallir, so that I had no one on my right. I also had no attorney, personal attorney.

I had felt that the Commission was going to be my advocate.

Q Yes, but what took place, if you could --

A Well, the --

Q --direct yourself to that?

A Well, the presiding woman explained the law under which I had filed the charges. She, I believe, went into some detail about -- yes, the amounts, the job, and someone from the Kallir, Philips, Ross group mentioned that there were fiv e or seven qualificiations to be a senior account executive and that I was not functioning at all of them. Again the presiding officer, I believe, asked if any senior account executive rated excellent on all of them and to the best of my recollection the answer to that was no, no one was exactly perfect on whatever had been stated. This was a written document from Kallir, Philips, Ross.

Then they particularly said I was deficient in making marketing plans, and the woman again said did they have a training program at the agency. And they said, no, there was no formal training program.

And to the best of my recollection Mr. Kallir stated

that I was incapable of learning if there had been a program to teach how to make marketing plans.

And again to the best of my recollection the woman responded, well, doesn't that seem not wise on the part of Mr. Kallir, if he felt I was incapable of learning such a talent to have put me on an -- supervising an account that billed over a million dollars a year. And in fact then I believe she produced the letter from Mrs.Korzilius, who was the person at the Upjohn Company who had sent in her definition of the functions of a senior account executive, and at that point complete chaos broke out.

Q Well, at this point I would like to show you a letter, and I would ask you if you can identify this letter (handing).

A Yes.

This is the letter that was introduced at the meeting.

Q And you are familiar with the handwriting of the -- Phyllis Korzilius, whose signature appears at the bottom?

A Yes.

MR. HOLMAN: Your Honor, at this time I would offer this letter as Plaintiffs' Exhibit No. 5.

MR. PATTERSON: No objection, your Honor.

(Plaintiffs' Exhibit 5 was received in evidence.)

BY MR. HOLMAN:

Q Miss Mc Gee, you just testified that there was a reaction to the production of this letter.

A Yes.

Q Would you describe the reaction that you witnessed at this conference?

A Well, Mr. Kaufman, the Kallir, Philips, Ross attorney started to shout and bang at the table and address himself to me shouting who had I contacted at the client, who had I contacted at the agency. At the same time, to the best of my recollection Mr. Kallir was addressing something along the same lines to, again, this woman, Mr. Morales, or whatever her name was. The decible count had gotten up so high in the room that I couldn't even hear if Norman Cooper was saying anything to Mr. Loperena. I was unable to answer. I found the whole thing very frightening. It continued for some time. And finally, I don't recall how it was calmed down, but Mrs. -- well, then, again, Mrs. Morales said that she was authorized to prevent employers from harassing or retaliating against employees who brought charges of discrimination but that there was no authority to prevent the employee from contacting clients

or fellow employees. And it continued on a bit. Then a discussion went into the validity of the letter of Mrs. Korzilius, I believe, again, it was either Mr. Kallir or Mr. Kaufman, who said that Mrs. Korzilius was a particular friend of mine and, you know, it should be viewed in the light of that as a letter from a friend, or for a friend, rather, than as a professional evaluation. In some way or another the meeting ended and I really was so upset I don't know how it came to an end, it was over three hours long and I never received a report on it and we all went back to work the next day.

THE COURT: We will suspend for a moment.

(Pause.)

THE COURT: All right, proceed, please.

BY MR. HOLMAN:

Q Did you discuss with Mr. Kallir or any other officer of the defendant Kallir, Philips, Ross, Incorporated the substance of what you have just testified to after the March 13, 1973 conference?

A No, there was never any discussion.

Q Now, at this time I would like to show you a letter, and I would like you to identify this letter for the Court (handing).

A This is the letter that is dated March 26, 1973 and

and it is from John Kallir and it was handed to me in the reception room of the agency at some time after 5 when I was going home. It was handed to me in a sealed envelope and I remember asking John whether I should open it at the time, and whatever answer he may have given me I didn't think it was good to open it then and I opened it when I went home and it informs me that I am relieved of all --

Q All right. We will be offering that.

A I am sorry.

Q It isn't necessary to read the letter to the Court, unless the Court would --

MR. HOLMAN: At this time I offer this letter as Plaintiffs' Exhibit No. 6 in evidence.

MR. PATTERSON: No objection, your Honor.

(Plaintiffs' Exhibit 6 was received in evidence.)

Q Did you follow the instructions that were given to you in this letter?

A Yes, I did.

Q And so you have not returned at any time to the offices of Kallir, Philips & Ross, Incorporated?

A No, I have not.

Q Did you take any action as a result of receiving this letter on March 26th?

XX

A I went down the next day with a letter to the New York City Commission on Human Rights and saw Mr. Loperena and he took me to see someone again, I don't know whether it was the same woman, it was a woman, and in my presence she called John Kallir and asked him whether his attorney knew he had written this letter and I don't know what response to that was. Then they said they would, you know, there were other things to be done and, as I recall, I left the offices, it was mostly in their hands at this point.

Q Now after you took the action that you have just testified about, did you have occasion to visit the offices of the United States Equal Employment Opportunity Commission?

A Yes, in April. April 23rd, I believe, it was, 1973.

Q And what did you do at the offices of the U.S. Equal Employment Opportunity Commission on that date, April 23rd, 1973?

A I believe the purpose of that was to fill out another form similar to the one I had filled out for the New York City Commission on Human Rights. An intake officer was the person that I had spoken to.

Q At this time I would like to show you a memorandum and ask you if you can identify this memorandum (handing). If you would tell the Court when it is dated.

A It is a memorandum dated March 27, 1973 which is the day after you received the letter from John Kallir --

Q Who is --

A It is from John Kallir to Al Price of the agency, it is listed here as staff, with an explanation of my disappearance.

MR.HOLMAN: At this time, your Honor, I would like to offer this as Plaintiffs' Exhibit No. 7.

MR. PATTERSON: Although there has been no foundation laid to show that this witness knows what this memorandum purports tobe or who it was given to, I nonetheless would have no objection to its offer, your Honor.

xx (Plaintiffs' Exhibit 7 was received in evidence.)

MR. HOLMAN: Again, your Honor, there appears a stamp ofthe EEOC on the copy.

THE COURT: I will disregard that. Do you have an extra copy of Plaintiffs' Exhibit 1, the stipulated facts?

MR.HOLMAN: It was given to your clerk, your Honor.

THE COURT: All right.

Q With respect to your visiting the offices of the United Stated Equal Employment Opportunity Commission on April 23, 1973, do you recall whom you spoke with on

that day?

A A Mr. Crown, I believe.

Q Did you ever have an occasion to talk with a Mrs. Keziah Walker?

A She was the investigator and I don't believe I met her until May of 1973, to the best of my recollection.

Q Directing your attention to the period from March 26, 1973 to --

MR. HOLMAN: Withdrawn.

Q At this time I show you a letter and ask you to identify it for the Court (handing).

A This is a letter dated May 15, 1973 from John Kallir to me, and you don't want me to read it?

Q Well, is it the original of the letter?

A No. It is not.

Q It is a copy, is that correct?

A This is a Xerox. It would appear to be aXerox.

Q A photocopy. And you say you received this in the mail?

A Yes.

Q And do you recall the date you received this?

A The 16th of May, I believe. '73.

Q And do you recollect the signature on the bottom of the page?

A Definitely, yes.

Q Whose signature is that?

A Mr. Kallir's.

MR. HOLMAN: Your Honor, plaintiff offers this letter as Plaintiffs' Exhibit No. 8.

MR. PATTERSON: No objection, your Honor.

xx (Plaintiffs' Exhibit No. 8 was received in evidence.)

Q Now, I direct your attention, Miss Mc Gee, to the period between March 26, 1973 and May 15, 1973. Did you during that period have any conversations with Mr. Kallir?

A No.

Q Or any other officers of the defendant corporation?

A No. None.

Q Were there any written communications during that period other than the letter that we have just made reference to and which is marked Plaintiff's Exhibit No. 8 in evidence?

A No, that was all I received, all the correspondence I received. The memo to the staff was not sent to me. I saw that at the New York City Commission on Human Rights.

Q And May 15, 1973, did you make efforts to find

alternative employment to your employment with the defendant Kallir, Philips, Ross, Incorporated?

A I am sorry. Did I makean attempt --

Q Efforts to find alternative employment?

A Yes, I did.

Q And did those efforts begin in and around -- in or around May of 1973?

A They began, I would say, yes, about that time. I needed money. I couldn't wait.

Q And have they continued, in fact, to the present?

A Yes.

Q And have you been successful in finding any alternative employment?

A I was hired as a typist in 1974 for ten days to type for the Girls Clubs of America, total salary of that was about $270. I worked for them again this year from February 10th through, I think, the first week in April and that was approximately $700. Those were theo only paid employment I had.

MR. HOLMAN: Your Honor, at this time I have no further questions for this witness but I wish to reserve my right to recall her as a rebuttal witness, if necessary.

THE COURT: You may proceed.

Q Your testimony on direct examination was that that letter had been requested by you from Miss Korzilius because you felt that she could provide a job evaluation that could not be provided by either you or some officer of the agency, was that your testimony?

A Evaluation and description.

Q How long had you known Miss Korzilius prior to March 8th of 1973?

A I believe she was on the Upjohn account when it was acquired by the agency, therefore I knew her as long as I knew everyone else on the Upjohn account.

Q And had you become friendly on a personal basis with Miss Korzilius during the course of your relationship with the Upjohn account?

A My friendship with her was no different than my friendship with others.

Q Were you familiar with her background in the advertising business in March of 1973?

A Advertising , I knew that she handled the advertising for certain products of the Upjohn Company.

Q Did you know in March of 1973 whether Miss Korzilius had ever worked for an advertising agency?

A She did not.

Q Were you aware of that fact in March of 1973?

A I don't recall.

Q Do you recall when you learned that she had never been employed by an advertising agency?

A The relationship between an agency and its client is such that one does not go around interrogating the client, Mr. Patterson.

Q Miss Mc Gee, would you please answer my question? I asked you when --

A I don't --

Q Do youknow when you learned?

A No, I do not know.

Q Could it have been prior to March of 1973?

A It may have been.

Q What led you to believe in March of 1973 that Miss Korzilius could write a job description of the function of a senior account executive of an advertising agency in that case?

A She had worked with a senior account executive prior to me and she was an intelligent person.

Q Well, isn't it the function of the senior account executive to prepare certain advertising material and make sure that things get done and then present a finished product to the client?

MR. HOLMAN: Objection, your Honor.

Q Is that a fair summary?

MR. HOLMAN: Objection as to form.

THE COURT: I will allow the question.

Q Is that a fair summary of the general obligations of a senior account executive?

A No.

Q Does a senior account executive work on a day-to-day basis with their counterpart at the client's offices?

A Yes, and on various products.

Q Were you in daily contact with Miss Korzilius prior to March 8, 1973?

A I was in daily contact with someone at Upjohn, usually.

Q With Miss Korzilius particularly?

A I doubt it.

Q Did Miss Korzilius know each and every thing that you were doing and the way in which you did it on the premises of the defendant?

MR. HOLMAN: I object to the question again, your Honor, as to form.

THE COURT: What is wrong with the form? What are you jumping up for and getting so excited? What is wrong with the form?

MR. HOLMAN: He keeps making reference to things without defining them. It is a very open ended reference, your Honor.

THE COURT: I think the question is perfectly understandable.

THE WITNESS: I didn't understand it, your Honor.

THE COURT: Well, if you don't understand the question say you don't understand it.

A I don't understand the end of it.

Q I will attempt to rephrase it.

Would you have, prior to March 8, 1973 --

A March 8th?

Q Of 1973, made Miss Korzilius aware of each and everything, item of work that you were doing at the agency on a daily basis?

A On her accounts, yes. On her products, I mean.

Q Well, isn't it a fact that she was made aware of the end product, or --

MR. PATTERSON: I withdraw that --

Isn't it a fact that she was made aware of the end product of your labors?

A No, she was aware of all the activities necessary to produce the end product.

Q All right. So that Miss Korzilius then knew everything that you were doing and therefore knew everything that a senior account executive should be doing, is that correct?

A I think only God knows everything that I was doing, Mr. Patterson.

Q Miss Mc Gee, I do not need a facetious answer.

A It is not facetious.

Q Did Miss Mc Gee know everything that you were doing in connection with your job as a senior account executive on the Upjohn account?

A Mrs. Korzilius, I believe, is what you meant. Mrs. Korzilius was aware of what I was doing on her account.

Q So therefore you believed in March of 1973 when you requested Plaintiffs' Exhibit 5 that she was very qualified to describe the functions of a senior account executive, is that correct?

A As she aw them, yes.

Q Did you request anyone at Kallir, Philips, Ross to provide you with a written job description in connection with the New York City Commission on Human Rights claim?

A No,I did not.

Q It was your testimony on direct examination, was

it not, that the reason you did not ask for such a description was that you felt you would not get an objective one, is that correct?

A An objective one, yes.

Q What gave rise to your believe that you would not get an objective evaluation of the function of a senior account executive from Kallir, Philips, Ross executives?

MR. HOLMAN: Objection, your Honor.

THE COURT: Overruled.

A Without seeing the memo and the letter to me I believe it --

Q Excuse me, what letter?

A The letter to me from John Kallir of March 26th and his memo to the staff had items in it regarding my relations to the client which I felt were --

Q Miss Mc Gee, you are not answering my question.

A I am answering.

Q We are talking about --

THE COURT: He is aking your references to job description and you are going off on a different tangent altogether and you are talking of a letter of March 26 and this letter Mrs. Korzilius wrote was on March 8th. He is inquiring with respect to this matter of the job description that you raised. Now please answer the question

and we will move among more directly.

A I didnot feel that John would give me an unprejudiced description.

Q Why did you feel that? Did you have any reason to believe that he wouldn't?

A Yes.

Q What was that reason?

A During the conversation I had with him he didn't seem to comprehend what I meant --

Q Which conversation are you referring to?

A December 4th.

Q He didn't comprehend what you meant about what, Miss Mc Gee?

A About why I felt Iwas doing the work of a senior account executive.

Q Miss Mc Gee,you had the title of senior account executive in December of '72, did you not?

A Yes, that is true.

Q And the reason you requested a letter from Mrs. Korzilius was to get a job description of what a senior account executive does;is that correct?

A It was to supplement my own description.

Q And my question to you is why did you believe that you could not get a job description from Mr. Kallir or some

other executive of Kallir, Philips, Rose, on the functions of a senior account executive?

I have not gotten an answer to that yet, Miss Mc Gee.

A I didn't believe I would get a correct one.

THE COURT: Now suppose we take our luncheon recess now and we will resume at ten minutes after two.

(Luncheon recess.)

AFTERNOON SESSION

2:10 p.m.

J O S E P H I N E M C G E E, resumed.

MR. O"DWYER: Your Honor, we have no objection to Mr. Patterson proceeding.

MR. PATTERSON The government's attorney isn't here either, your Honor.

THE COURT: Well, wait.

(Recess.)

THE COURT:Proceed, please.

CROSS EXAMINATION (Continued)

BY MR. PATTERSON:

Q Miss Mc Gee, before we recessed, do you recall we were discussing the letter that was written by Miss Korzilius which has been entered into evidence as Plaintiffs' Exhibit 5. We were discussing at that point in time the reasons why you requested such a letter from Miss Korzilius, do you recall that?

A Yes.

Q You have testified, have you not, that you sought this letter from Miss Korzilius because you felt he could not get an objective evaluation of your job function from anyone at KPR, is that true?

A Yes.

Q Did you know at that time, and we are talking about early March of 1973, any senior executives at other accounting agencies?

A I knew the men that came from BBDO and handled other Upjohn accounts but I don't know what their titles are.

Q BBDO is another advertising agency?

A They were taken over by another advertising agency, I think it is Corbett.

Q Did you know any other advertising agency executives outside the people at KPR and BBDO in March of 1973?

A I would meet other advertising agency people at industry meetings but I didn't know anyone with that title.

Q You were at that point in time attending regular monthly meetings of an organization called Pharmaceutical Advertising Association, something of that nature?

A Pharmaceutical Advertising Club, yes.

Q And you attended their luncheons or meetings which took place on a monthly basis, is that not correct?

A Yes, when it was convenient.

Q During the course of those luncheons and meetings, you did from time to time, get to meet other people in the pharmaceutical advertising business, did you not?

A Yes.

Q Did you ever consider at the time you saw this letter from Miss Korzilius to solicit a letter of this nature from someone at another agency?

MR. HOLMAN: Objection, your Honor, immaterial.

THE COURT: Overruled.

Q No.

Q Were you aware in March of 1973 of an organization commonly known as the 4 A's, the Advertising Association of America?

A I had heard of it.

Q You knew of its existence?

A Yes.

Q Did you consider in March of 1973 obtaining or seeking to obtain a job description of a senior executive from the 4 A's?

A No, I did not.

Q Did you in March of 1973 consider seeking a job description from other senior account executives then working for the defendant corporation?

A There were none at that time. I was the only senior accont executive.

Q Is it your testimony that the only person who you thought or you considered to obtain such a job description

from was Phyllis Korzilius?

A I felt it would have been sufficient to get one from her.

Q You were interested in getting as detailed a job description as you could for the purpose of advising the New York City Commission on Human Rights people precisely what your job function was; was that not your intent?

A Yes.

Q At that point in time, you did not feel that someone who was connected with an advertising agency or advertising executive was more qualified to give such a job description than Miss Korzilius?

A I knew no one I could approach.

Q When you requested this letter from Miss Korzilius, did you ask her to give you a specific type of statement?

A I told her how it would be used.

Q What did you say to her?

A Not verbatim, but I said that I needed something which would describe my functions as a senior account executive and that I had submitted mine or something, and I felt, we felt actually at that time --

Q Who is "we"?

A I believe Mrs. Loperena -- that a broader description was needed and would she please furnish one re-

garding the duties of a senior account executive.

Q Is that all you asked her for at that time?

A Yes.

Q Did you ask her to provide an evaluation of your performance in that same letter?

A No, not that I recall.

Q I show you Exhibit 5 in evidence and ask you whether the contents of that letter reflect answers to the question you wanted answered of Miss Korzilius.

A The question I wanted answered by her?

Q Yes.

A I had not given her questions to answer.

Q You asked her to describe what a senior account executive is supposed to do. Does that letter accurately do it?

A If she signed it, I would say this is how she would see it, yes.

Q I am asking you having been a senior account executive to read that letter and to tell this Court whether or not you believe that letter accurately depicts the duties of a senior account executive.

MR. HOLMAN: Objection.

THE COURT: Overruled.

A Yes, I would say so. Perhaps not one hundred

per cent.

Q Is it not a fact that one of the obligations or duties of a senior account executive is that the client is supposed to receive the impression, whether it be fact or not, that the agency is devoting all of its efforts to that client's business?

A Not only should it be their impression, it should be the truth.

Q Is it not a fact that the function of an account executive or senior account executive is to insure that the relationship between the client and the agency, in his case Upjohn and the defendant, is kept at the optimum level?

A Yes.

Q Is it not the function of a senior account executive or an account executive to insure that any problems that may exist in the agency are not conveyed, if at all possible, to the client?

A I would think so, yes.

Q Miss Mc Gee, did there come a time in February or March of 1973 when you as part of the team working on the Upjohn facilities in Kalamazoo, Michigan?

MR.HOLMAN: Objection. I think he is going far afield at this juncture.

THE COURT: Overruled.

A There were two.

Q Did you participate in both of these presentations?

A Yes.

Q What was the general purpose of the first of those presentations?

A The product on which were going to make the presentation was Prostaglandin and its proved use by the government was for second trimester abortions. At that time while we were working on the presentation, all state laws were not the same. This was a very important consideration because the presentation was going to be expensive, in the sense that the first meeting was called so that the client, the Upjohn Company, could tell us with no comment on anything else whether or not certain aspects of the presentation would not be lawful in certain states.

Q I don't think you specifically answered my question. What exactly is a presentation of the nature that was given to Upjohn?

A That presentation?

Q What is a presentation? What do you do at a presentation?

A A presentation -- well, it is like show business.

There are several people involved. You explain why a certain aspect of promotion to physicians should be made. This has to be shown because an analysis of competitive products, the aim the competitors are taking, pricing, marketing, government approval. A great deal of indication on the type of disease for which it is indicated or approved and typical ads which might be suggested.

Q Typically put, isn't a presentation of that nature, the nature of the one that was given at Upjohn, an opportunity for the agency to show to the client their ideas for an advertising campaign or public relations campaign, isn't that in general terms what a presentation is?

A It is not -- as far as you go, yes, but this was the first competitive presentation we had done at Upjohn.

Q When you say competitive, what do you mean?

A There was another agency involved also making a presentationg and the Upjohn Company was going to decide which agency would handle the product.

Q What you are saying is, there was a campaign to be launched for a particular product or group of products and you, by you I mean KPR and another agency were competing to get this advertising business and the presentation you would make, presumably the competitor would make a similar one,

is that correct, and the Upjohn Company would chose between you?

A Yes.

Q Did you at the time the presentation was being prepared and at the time it was made consider that this was a fairly important consideration to be made in terms of the business of your agency?

A Extremely important.

Q And you did put a lot of time into the preparation for this?

A A great deqal of time.

Q And other people at the agency likewise put a great deal of time into it, is that correct?

A Yes, but I was the only one that went to abortion clinics.

Q Miss Mc Gee, you have testified on the evening of March 26th as you were about to leave the office of the defendant, the president of the company, John Kallir, came up to you and handed you a sealed envelope which later turned out to be Exhibit 6 in evidence by the plaintiff, is that correct?

A I can't see from here.

Q The letter telling you you shouldn't come into the office from thereon out?

A Exactly.

Q Did you open the letter at the time Mr. Kallir gave it to you?

A No, I did not.

Q Did he say anything to you when he handed you the letter?

A I recall asking whether I should open it and I don't recall the response or anything that would have made me open it. I did not open it until I went home.

Q Up until the moment that Mr. Kallir handed you that letter and going back as far as December 4, 1972, had anyone at the agency, Mr. Kallir or anyone else connected with the defendant corporation in any way indicate to you there displeasure with your having filed a sex discrimination claim?

A They indicated to me?

Q Yes, to you.

A No.

Q Up until that point in time when Exhibit 6 was handed to you, did youhave any indication from anyone at the defendant corporation that any action was being taken against you because you had filed a sex discrimination claim?

A By action, you mean legal action?

Q Had they done anything? Had they taken away any of your responsibilities?

A To my knowledge, no.

Q Had they taken away any of your benefits or pay?

A I don't know what their intention had been.

Q They hadn't done it, is my question?

A No.

Q I amnot talking about what was in their mind.

Had they in any way changed the manner in which your work was supervised?

A No.

Q Were you required to show your work to someone that you hadn't been so required to do before you had failed a claim?

MR.HOLMAN: Objection. It was already asked as to whether there was any change in supervision.

THE COURT: Overruled.

A To my knowledge, no.

Q So in fact up until the moment you were handed that letter on March 26th, it is your testimony that the defendant to your knowledge, took no action against you in connection with the fact you had filed a claim with the City Human Rights Division?

Q What happened after the letter was -- withdrawn.

Did Josephine Mc Gee ask you to produce the letter at that time?

A It was my idea, really. I think I did inform Miss Mc Gee that I was going to show them the letter, but basically it was my idea because it seemed to me that the body of the letter contradicted the assertion that there were certain things she wasn't doing.

Q Then what happened after the letter was produced, what was the reaction?

A The respondents were very, very upset. They became very angry. Mr. Kaufman, their attorney, became very nasty. Their reaction was such that the conference just broke up. They were very, very upset, very angry.

Q What were they upset at exactly, could you tell?

A Yes. They were upset about the fact that a letter had been obtained from a client and that at some point the client had been informed what had been transpiring as a result of the action.

Q Then you say the conference broke up?

A Excuse me?

Q Then you say the conference broke up?

A Yes. It really broke up. There was no more communication.

Q When did you find out that Josephine Mc Gee had been placed on a leave of absence?

A About two weeks, I believe, after the fact-finding conference or something like that, Mr. Loperena, the investigator in the case, came into my office and notified me that Josephine Mc Gee was in the office. I know I learned from Mr. Loperena that Josephine had been put on a leave of absence and Josephine came in the office, Miss Mc Gee. She showed us a letter.

Q I want to show you what has been marked as Plaintiffs' Exhibit 6 and ask you if that is the letter she showed you?

A Yes, this is the letter.

Q Go on.

A She brought this letter with her and it was decided that a complaint of retaliation would be filed.

Q Who decided that?

A It was basically my decision, although it was caused by Josephine, basically it was my decision.

Q I show you what has been marked as Defendant's Exhibit A and ask you if you recognize that?

A This is the retaliation complaint that was filed with the Commission on that particular day.

Q That is the one that you advised Josephine Mc Gee to file?

A Yes, this is the complaint.

Q Did you have occasion on that day, March 27th, when Josephine was in the officer or even after Josephine left to contact the defendant in this case who was the respondent in that case, Kallir, Philips, Ross?

A Yes. I think I called Mr. Kallir -- I believe Josephine informed us that a memorandum had gone out to the respondents discussing the circumstances upon which Josephine had been put on a leave of absence. She was very concerned about it, she was very upset and I called Mr. Kallir. I talked to him. I believe that I discussed with him the provisions of the New York City on retaliation, the New York City law on human rights and requested from him that he submit to us a copy of the memorandum that had gone out to staff along with a copy of the letter that had been given to Josephine.

Q Did you ask him why he had take the actions that he did?

A I am sorry.

Q When you were talking to him over the phone, did you ask him why he had taken the actions he did?

A Yes.

Q What was his response?

A His position was that she had discussed the case

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with other people and clients and that he would not tolerate that.

Q Did he, in fact, send you a copy of those two documents that you just referred to?

A Yes, he did.

Q I will show you Plaintiffs' Exhibit 7 and ask you if you recognize it?

A Yes. This is the staff memorandum tht I was talking about.

Q I want to show you a letter to you dated March 27th with John Kallir's -- under John Kallir's name.

Do you recognize that?

A This was the cover letter that came with the documents I had requested.

MR. GONTAREK: I would like to have this marked as Plaintiffs' Exhibit 9 and offer it into evidence.

MR. PATTERSON: No objection, your Honor.

(Plaintiffs' Exhibit 9 was received in evidence.)

Q When did you find out that Josephine McGee's paychecks were terminated, to the best of your recollection?

A I believe some time in May of 1972, Mr. Loperena informed me that Josie had been fired.

THE COURT: Call the next witness.

MR. HOLMAN: Your Honor, the plaintiff-intervenor rests at this time.

MR. GONTAREK: The Commission rests at this time.

THE COURT: Defendant may go forward.

MR. PATTERSON: I would like to make a motion to dismiss the claim that the plaintiff and plaintiff-intervenor has failed to state a claim.

THE COURT: Motion denied. The issue will be decided by the trier of the fact.

MR. PATTERSON: The defendant calls John Kallir.

J O H N K A L L I R, a defendant, called as a witness in his own behalf, having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PATTERSON:

Q Mr. Kallir, are you associated with the defendant Kallir, Philips, ross?

A Yes, I am.

Q What is your connection?

A I am the founder of the corporation and its president.

Q Is that corporation engaged in the business of being an advertising agency?

A Yes.

Q How many years have you been in the advertising business, sir?

A All together or --

Q All together.

A Since 1949.

Q How long has the defendant corporation been in existence?

A Since 1962.

Q In your capacity as president, are you the chief executive officer of that company?

A Yes.

Q In addition to general executive duties, do you from time to time participate in the agency client work lead of the agency?

A Yes.

Q I direct your attention to the fall of 1972. At this point in time, did the agency have an account known as the Upjohn Company?

A Yes.

Q Do you recall approximately what percentage of the gross business the agency did, that the Upjohn Company represented?

A I think it was about 10 per cent of our income.

Q At that time in the fall of 1972, approximately how many clients did the agency have?

A I think about a dozen.

Q Were you in the fall of 1972 directly involved with the Upjohn account?

A Yes.

Q What was your function at that point on that account?

A I was what we call the management representative on the account.

Q Beneath you in the chain of command with respect to that account, who were the individuals and their titles?

A The account supervisor was Jay Lilker, senior vice president and under Jay, the senior account executive was Josephine Mc Gee.

Q Had you been the management representative on this account from the time that Miss Mc Gee became the account executive?

A No.

Q When did you become the management representative on this account?

A I think in November, as I remember. I think in November, 1972.

Q At the time you became the management representative on this account, did you have occasion to discuss with your predecessor evaluation of Miss Mc Gee's services as an account executive?

A Yes.

Q Who was your predecessor?

A Warren Ross.

Q Is he also an officer and principal of the company?

A Yes, of the agency.

Q What was the general evaluation that Mr. Ross told you of Miss Mc Gee?

MR. HOFMAN: Objection.

THE COURT: We are not trying a discrimination case now on account of sex or difference in salary but if you want to go into that, all right, only because I am sitting without a jury.

MR. PATTERSON: It is relevant --

THE COURT: I said if you think it is, it may be received. I am trying to get the lawyers to understand what the issue is in this case and both of you seem to insist upon getting away from it.

If you think it is relevant, I will allow the answer.

Q Do you recall the question, Mr. Kallir?

A Yes. I think basically we were satisfied with Josie's performance although there were some areas where she was particularly good and those were the inter-personal areas, meeting with the client and keeping them happy. She was very good at that and other areas in which she was less good.

Q In your estimation, Mr. Kallir, what is the responsibility of an account executive or senior account executive with respect to the agency's relationship to the client?

A Well, the senior account executive represents the agency to the client and has a double role. He or she should be well accepted by the client at the same time he or she has to be aware at all times of the agency and representing the agency and doing not only the day-to-day work but also coming up with new ideas, making recommendations as is indiated or as we see the opportunities.

Q Up until December of 1972, how would you rate or evaluate Miss Mc Gee's performance in connection with the duties you just described?

A Good.

Q Did there come a point in time after December 1972 that you had occasion to change you opinion of her conduct?

A Yes.

Q Approximately when was that, if you can give a specific date?

A Well, I would say in March. It wa sort of a slow, almost unwilling kind of realization, because I had hoped against hope that nothing at all would change on the account. I would say in March.

Q What specifically did you notice in the nature of change in her conduct or attitude in March of 1973?

A I noticed great resistance, if not hostility to Jay Lilker and I was made aware by the client that there had been some trouble in Kalamazoo.

Q By client, you mean the Upjohn Company?

A Yes.

Q Specifically, you have just referred to being made aware by the client. Specifically who at the client made you aware of any problems?

A Mr. Shea.

Q Do you know his full name and title?

A Bernard, usually known as Bernie, Shea. His title is something like promotion manager, but I am not sure of the official title.

Q Was he the managerial function at the Upjohn

Company or was in 1973?

A Yes.

Q What specifically did you receive from Mr. Shea that gave rise to your growing change in evaluation?

MR. HOLMAN: I would ask the Court to instruct Mr. Patterson not to lead his witness.

THE COURT: You may answer.

Before you go into that, what was Mr. Shea's status at the Upjohn Company and also his relationship to you. You were the advertising agency and Upjohn was the client. What was his role as far as the line of communication between the client and the agency?

THE WITNESS: He was the highest marketing executive at the Upjohn Company that we would deal with on a more or less regular basis. On a few special occaions we would see and talk to people who were higher than Mr. Shea, but he was for most intents and purposes, he was the highest man we would deal with.

THE COURT: Proceed.

Q You testified there came a point when you received some communications from Mr. Shea about Miss Mc Gee?

A Yes.

Q Will you tell the Court when this was and what was said to you?

A Mr. Shea is a very polite and somewhat indirect individual --

MR. HOLMAN: I move to strike that as being unresponsive to the question.

THE COURT: Go ahead, I will disregard it.

A (Continuing) When he made me aware of what happened at a meeting out there --

THE COURT: How did he make you aware?

THE WITNESS: He called me or I spoke to him. I don't remember. I spoke to him quite often on the phone.

A We had been working on a very important presentation. Later on it turned out it wasn't but we thought it was very important. The client though t it was very important, and there had been in effect a dry run, a rehearsal because it was so important.

THE COURT: That was the first presentation, the February one?

THE WITNESS: Right.

A (Continuing) I was not present at the early one and apparently it did not go too well and Mr. Shea -- I can't tell you the exact words but he told me it didn't go over well and there seemed to be discord and that it didn't seem quite clear who was recommending what in the agency.

THE COURT: Discord on whose part?

THE WITNESS: On the part of the two people from our agency, from our office who had gone out to Kalamazoo.

THE COURT: Who were the two people?

THE WITNESS: Mr. Lilker and Miss Mc Gee with the only two that I know.

MR. PATTERSON: At this time I would like to offer and read a portion of the oral deposition taken of Mr. Bernad Shea in Kalamazoo, Michigan under Rule 32.

THE COURT: In the middle of his testimony?

MR. PATTERSON: I think it can be tied in with his testimony and I believe the particular portion will enable Mr. Kallir to answer the questions more appropriately.

THE COURT: You may show it to him to refresh his recollection but I don't think you ought to interrupt his testimony, unless Mr. Holman has no objection.

MR. HOLMAN: I would have an objection, yes.

THE COURT: I think you ought to finish your examination with this witness if there are matters where you think his testimony requires refreshment, you could show him any document that would refresh his recollection.

Q Mr. Kallir, I show you a portion of a deposition of Bernard Shea taken in Kalamazoo, Michigan pursuant to the plaintiff-intervenor's subpoena and I am referring specifically to page 25 of that deposition and I ask if you

would examine that page of the deposition and see if that in any way refreshes your recollection as to what Mr. Shea told you.

MR. HOLMAN: I have to object to this. He has to ask him first if he recalls.

THE COURT: Let us not spend time on technical rules of admissibility if it refreshes the witness' recollection.

You ought to be somewhat familiar with the case in this circuit which suggests when a case is being tried without a jury, the assumption is the Judge will only consider relevant evidence and frequently will take everything that is offered.

MR. HOLMAN: I understand that but with respect to the story that we are now going to hear from this witness --

THE COURT: Please don't characterize it as a story. I am listening to witnesses and I have to evaluate the testimony of witnesses.

MR. HOLMAN: Yes, your Honor.

Q Having had an opportunity to look at a portion of Mr. Shea's testimony, does that refresh your recollection as to what Mr. Shea specifically said to you relative to that first presentation?

A Yes, except if he had said as much to me at the

time I think I would have been more upset and that is why I said he was very police before. He gave me to understand things did not go too well but the specific details that are in his testimony I was not aware of at the time.

Q Did he tell you specifically what caused the presentation not go to well?

A Yes, I think he did say that there were interruptions.

Q By whom?

A By Miss Mc Gee of Mr. Lilker, her superior.

Q Did he tell you anything else that occurred at that presentation?

A I think at one point he did say -- I can't tell you quite because we talked about it a number of times and I don't know when he said it but I do know he said at one time I wish she would sit down already and let Jay talk.

THE COURT: Jay is Mr. Lilker?

THE WITNESS: Yes.

Q and Mr. Lilker at that time was her supervisor?

A Yes.

Q Mr. Kallir, there came a point in time on March 26, 1973 that you apparently composed and delivered to Miss Mc Gee a letter which put her on a leave of absence or whatever terminology one might use.

Would you please tell the Court what led up to your decision to write that letter?

A We began to suspect that some people at any rate at the Upjohn Company were aware of Josie's action and were being enlisted by her on her side. We had a feeling that this was happening but we had no proof and no definite indication until the meeting that Mrs. Morales described where at the end of the meeting Phyllis Korzilius' letter was produced which did upset me and this was the first written tangible proof we had that at any rate, this one person knew about this situation.

Q Why did it upset you.

A Because the relationship between client and agency is very sensitive, very much based on trust and on personal relations in a way like between a lawyer and his client, and we have not in any way, by hint or in so many words mentioned anything to either our employees or the Upjohn Company of this action and in fact Josie and I travelled out to Kalamazoo and saw the client and worked on the account together and everything was absolutely as if nothing had happened.

Q When was that that you travelled with her?

A I think it was in January or February of 1973. It was early in '73. It was just Josie and I, just the

two of us.

THE COURT: Was that before the first presentation or before the dry run?

THE WITNESS: I think it was before the first, yes.

Q In addition to your learningof the letter solicited from Miss Korzilius, what other factors led to your preparation of the letter of March 26th?

A I had occasion to talk to a number of our employees, I remember I talked to Pat Jakes who workeddirectly with me on a different account who was then an account executive at the agency and we discussed her case and Pat told me that Josie, that she was informed about the case and it was certainly my impression that Pat was very close to filing similar charges and I think other people such as Norman Cooper in the agency, also by that time were aware of employees having been informed by Josie of this action which we had not in any way publicized to our employees and coming back to Upjohn, the main indications that we had, that I had, were Mr. Shea's phone call and also so far as I am concerned, even though that may not have been as clearly apparent to the client, her behavior at the secondpresentation which was the one that was really the big one. Of course,the agency people are more tense and more nervous and more concerned

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that everything should go well then the audience out there so at the slightest possibility and sometimes we overreact, but at the slighest possibility of something going off the tracks, we are sensitive to itand it was my feeling that even at the second presentation things were not going according to what we had planned.

THE COURT: Were you present at the second one?

THE WITNESS: Yes.

THE COURT:You weren't present at the first?

THE WITNESS: No.

THE COURT: What occurred at the second presentation?

THE WITNESS: Miss Mc Gee took issue again I think mainly with Jay Lilker but I think even with the plan that was being presented, the agency's plan, not any one individual's plan, she also I think talked too much and out of turn when we decided that certain questions would be handled by other people on the team, she would take over. So I had felt there was an undercurrent of antagonism at this extremely important presentation.

Q Had Miss Mc Gee had a reputation of having done things like this before December of 1972?

MR. HOLMAN: Objection to the form of the question, your Honor.

THE COURT: I will sustain it.

Q Do you know of any other time prior to February of 1973 that Miss Mc Gee again demenstrated such conduct?

A We had another account executive on the account whom I had known for a long time and whom I had known to be very experienced and effective but perhaps not the most assertive account executive we ever had. His name was Ed Martin. We put him on the Upjohn account because we thought he was very good.

He didn't last on the account and some people felt Josie didn't want himon the account and undermined the account. I can only say this was an impression.

THE COURT: So your answer is that was the first time that this occurred?

THE WITNESS: No. From my own personal experience where I was involved, it is the only time.

Q What is the significance of this type of presentation, form of presentation to the agency?

A Well, it wouldhave been most important activity for our agency to be involved with on the Upjohn account. It was then decided these products would not be advertised at all but we didn't know it at that time.

Q Based on your experience in the advertising business, Mr. Kallir, how would you describe the agency's function at a presentation?

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A Well, we analyzed the market. We analyzed the position of the Upjohn Company in the industry and with physicians, with doctors.

Q I think perhaps you misunderstood my question.

THE COURT: I think what your counsel has in mind is this: Once you prepare a presentation and submit it to the client, does it reflect the combined judgment of the people in your organization?

THE WITNESS: Yes.

THE COURT: In short, your theory is, you present a united front that this represents your judgment as to a marketable product with the idea of urging it upon the client?

THE WITNESS: Yes, correct.

THE COURT: That is what you had in mind?

MR. PATTERSON: It is precisely what I had in mind.

Q Mr. Kallir, was it your opinion at the conclusion of the formal presentation to the Upjohn Company that that objective had not been met?

A I couldn't say. Usually at the end of the presentation there are usually some people in the audience that congratulate you and others who walk out and don't say anything.

Q Do you think Miss Mc Coe's presentation enhanced

it?

A No.

Q Getting back to your motive for the letter of March 26th to Miss Mc Gee, were there any other activities or incidents that precipitated that letter?

A I don't think so. I can't think of any others.

Q I show you Plaintiffs' Exhibit 6, and particularly point your attention to the first paragraph of that letter.

Mr. Kallir, what did you mean by the words that are in that first paragrpah at the time you wrote them?

A What I meant was that we could not allow any individual on the account to undermine other people on the account. By that time we saw we were not presenting a united front to the Upjohn Company and equally, at least equally as bad that the Upjohn people were being solicited to take sides in an internal agency dispute which puts the client, some client individuals in a very difficult position and makes it extremely difficult for an agency to deal with a client if you work with a particular individual in Kalamazoo and you think this man or woman does not really have on his mind what we are talking about right now, but an internal agency dispute and possibly that individual may be taking sides in this agency dispute and that was the reason we felt we could not have Josie involved with the Upjohn Company.

Q You say with the Upjohn Company?

A On the Upjohn account.

Q Why on March 26, 1973 did you merely put Josie on a leave of absence as oppo ed to terminating her forthwith?

A Because the only determination we made was that we simply could not afford to have her working on the Upjohn account. We didnot make any other determination so far as other work in the agency was concerned or other account concerns, but her usefulness to the agency on that particular account was at least for the duration of this action, severely impaired.

Q Why do you relate that performance to the duration of the action?

A We didn't know how long this thing would last and we thought if it is resolved one way or the other, and this was only the city, we will see what happens, but while this was going on, we could not afford to have Josie stir up people in Kalamazoo on behalf of her action against KPR.

Q Was it your feeling then that the conduct which you objected to, or found objectionable, was occasioned only by reason of her being involved in prosecuting her claim?

Do you understand my question?

A No.

MR. PATTERSON: I will withdraw the question.

Q When you determined to put her on this layoff, was it your opinion at that time that the problems you were having with Josie in relation to her work arose out of the fact that she had filed a claim?

A Yes.

Q How did those two things connect? Was it the fact she had filed a claim?

A No, not at all.

Q What was it, sir?

A It was our gradual realization that she was polarizing certain people within the client organization against the agency and when I went out, before I wrote this memo I went out to Kalamazoo on very short notice to tell the client it was my and the executive committee's decision, but obviously I wanted to know what the client would feel about this and I found that a lot more was known out there than I had ever suspected. In fact I started from scratch and I said let me tellyou what happened a few months ago and they interrupted and said you don't have to tell us because we know, and actually, whatever that happened, a few days before this letter was written, March 23rd, I think it was. That was the first time that I had gone to anyone at the Upjohn

Company and mentioned anything about this action, but by that time, I was told by Mr. Henry, who was also at this meeting, who is Mr. Shea's superior and by Mr. Shea, that they were well informed and that many people out there were indeed talking about that.

Q If there had been another opening for account executive in your agency on March 26, 1973, would you have sent this letter to Josie Mc Gee?

A No, I would not have sent this letter. I still would have taken her off the Upjohn account but I would not have told her stay home.

Q Why did you tell her to stay home, Mr. Kallir?

A Because there was no work for her. If she was just sitting, brooding in her office, no work on Upjohn, it would be a very difficult position for her as well as for us but of course we did keep paying her.

Q Was it your intention prior to giving Josie this letter on March 26, 1973 to try and find another spot for her within the agency?

A Well, there wasn't any. I mean, it is not a matter of looking around and finding something that you didn't know, that you hadn't known existed. If there had been an opening, if there had been an opening, a possibility of an opening, we certainly would have considered it. In fact, we had

originally, when we hired Josie, there was no opening for her then either and we kept her on because we wanted her.

Q There came a time March 15, 1973 when you sent another letter to Miss Mc Gee which said in effect you are hereby terminated --

A You said March?

Q May 15, 1973, you are hereby terminated and will no longer receive salary?

A Yes.

Q What occurred between March 26, 1973 and May 15, 1973 to change your mind as to whether or not she should continue on pay?

A Well, nothing concrete. We had no way -- we had indications she was in touch with some people at the Upjohn Company but nothing, there was no additional incident after the March presentations.

Q You have heard people testify earlier today that in the beginning of March of 1973 at the City Human Rights fact-finding session you and your attorney, Mr. Kaufman, who was a partner in my firm, became rather upset at the introduction of Miss Korzilius' letter. Was that a turning point in your mind, whether or not Miss Mc Gee would continue to work on the Upjohn account?

A That was the first concrete evidence we had that

she had contacted people and we knew it was more than just Miss Korzilius because other names were about to be mentioned at that hearing, then there was an interruption and other names were not mentioned, but that was the first concrete evidence we had that the Upjohn people knew about it, so I would say yes, that was certainly a turning point.

Q Mr. Kallir, did youplace Miss Mc Gee on leave of absence on March 26, 1973 because she filed a claim of sex discrimination against the defendant corporation?

MR. HOLMAN: I think that question has been asked.

A He may answer it.

A Did we --

Q Did you put her on leave of absence because she filed a claim.

A Absolutely not.

Q Did you terminate her salary on May 15, 1973 because she had filed an amended complaint againstthe company?

A Absolutely not.

MR. HOLMAN: I also have to object on the ground he is leading the witness.

THE COURT: It calls for a yes or no answer, unless

you want to ask him what reason, for what reason did you terminate her services on May 15th.

MR. PATTERSON: Which was to be my next question.

A I think you asked that before but I will answer it again.

It was simply that we didn't know what to do with her. We had her on staff. She was home drawing full pay and there was no work for her and I did know that no matter what happened, that I would not put her back on the Upjohn account.

MR. PATTERSON: I have no furtherquestions, your Honor.

CROSS EXAMINATION

BY MR. HOLMAN:

Q Mr. Kallir, is it your testimony that the suspension letter of March 26, 1973 was sent out --

A It is here if you want it.

Q I wasn't asking you to look at it. I was going to ask you some question with reference to it.

Is it your testimony that the reason for that March 26, 1973 letter were the result of Josephine Mc Gee's contacts with the Upjohn Company and that reason alone?

A No. That was the main reason.

Moore, Carolyn White, Barbara Morano and Pat Jacques.

"Q Did these conversations take place in the office to your knowledge or over the telephone?

"A. Over the telephone or in person, but not in the office. She was not in the office. After March 26 she was not in the office."

Is your testimony the same today as it was yesterday afternoon or is it as it was on February 7, 1975?

MR. PATTERSON: I will object to the characterization.

THE COURT: Objection sustained.

Q Do you agree with the testimony --

THE COURT: Why do you ask if he agrees? If you have contradictory matter presented then you may pursue the inquiry further.

Q Is it a fact, Mr. Kallir, that you had no concrete information about what McGee's conversations were with female employees of KPR or employees at Upjohn Company from March 26, 1973 and May 15, 1973?

MR. PATTERSON: Objection. The question has been asked and answered.

THE COURT: Overruled.

A Yes. I had no concrete proof, that is true.

Q When you say you had no concrete proof, did you

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have any information whatsoever?

A Yes.

Q From whom did you obtain this information?

A From various people in Kalamazoo at the Upjohn Company.

Q Who would their names be?

A Bernie Shea, Jim Penrose, Bob Handy. At least those three. There were probably others.

Q What did they say to you?

A It is impossible for us --

Q What did they say?

A I will tell you what they said. They are not sure of the exact date because March 26th doesn't mean anything to them.

Q What did they say to you?

A They said there was continued contact with Josie, but the dates they could not tell me.

MR. PATTERSON: Would you instruct counsel to let the witness finish his answers. He has been doing it persistently.

A March 26 doesn't mean anything to the people at the Upjohn Company so they can't give me a date.

MR. HOLMAN: Move to strike as being unresponsive.

THE COURT: The question is what did they say to

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you?

THE WITNESS: They said there was continued conversations with Josie after she was home, after she had been taken off the account but I don't know the dates.

THE COURT: What was the nature of those conversations? You say continued conversations.

THE WITNESS: They were in touch with her. I didn't go into details. I don't know.

Q Did they tell you when they were in touch with her?

A No.

THE COURT: Does this mean that they called her or she called them? This is getting very vague and I would like to get some evidence.

THE WITNESS: That is why I say it is vague. I don't know who called whom. I can't tell you.

Q Was it your testimony, Mr. Kallir --

THE COURT: Put a question and please get an answer from him and if you have other information which you think permits a further question, you may go back to the other questions and answers. This is one of the problems here.

Q Did Mr. Henry tell you, Mr. Fred Henry, did he ever tell you that Josephine McGee had solicited letters

or testimonials from employees of the Upjohn Company?

A I am not sure who told me, if it was Mr. Henry.

Q Did anyone ever tell you?

A It was brought up at a luncheon meeting. I can't tell you which one of them told me. There were only three people present, Mr. Henry, Mr. Shea and myself.

THE COURT: When do you fix the time of that luncheon meeting? Is that the occasion you flew to Kalamazoo and had lunch at the airport?

THE WITNESS: Yes. It was Friday, March 23 since it is my memory that March 26th is a Monday.

Q Did any employee of the Upjohn Company tell you that they were disappointed that Josie had left the Upjohn account?

A At any time? Did anybody ever tell me that? Yes.

Q Who told you?

A Jim Penrose.

Q When did he tell you this?

A I can't tell you. A number of times. I can't tell you any one date.

Q Isn't it a fact the first time he told you was after March 26th and before you fired her?

A That is possible, yes.

Q In spite of this information from a product manager of Upjohn, did you still think it was good business judgment to fire Josephine McGee?

A Obviously I did, yes.

Q Has any officer of KPR ever stated they regarded the letters, the letter that Josephine McGee had solicited as "documentary evidence"?

A I don't know. I don't know what you are driving at.

Q Did you take any part in the preparation of an affidavit which was submitted in this case in opposition to the plaintiff's motion for a preliminary and permanent injunction?

A No.

Q You mean you are not aware -- I think I can tell you it was sworn to the 13th day of December, 1974, a sworn statement by Norman Cooper who was a vice-president, senior vice-president of your company.

A Executive vice-president, yes.

Q It was sworn to before Mr. Patterson, is that correct? Are you aware he said "During the month of the filing of said charge, the movement began to conduct a campaign directed at the employees of the account she was supervising to obtain letters and statements of commendation

as to her efficiency for the purpose of gathering documentary evidence introduced in support of her filed grievance with the Human Rights Commission of the City of New York."

Are you aware of that statement?

A No, until now I have never seen it.

Q Have you ever characterized these letters --

MR. HOLMAN: Withdrawn.

Q Have you ever said that one of the reasons why you fired Josephine McGee is that you were "financing a war against yourself"?

A No. That she was financing a war?

Q That "You are financing a war against yourself" by continuing to pay her after March 26, 1973.

A It doesn't sound familiar.

Q Any officer of your company ever make that statement?

A It doesn't sound familiar.

Q Aren't you aware Mr. Cooper stated in his affidavit in this case --

MR. PATTERSON: The witness already testified he never saw Mr. Cooper's affidavit.

THE COURT: Objection sustained. Why are we spending time on that?

Q Has any officer of KPR ever told you that you were

mistaken about your understanding of what happened at the prostaglandin presentation on March 8th, 1973?

A No, I don't think so.

Q You mean, Mr. Kallir -- is J. Lilker an officer of your corporation?

A Yes.

Q What office does he hold?

A Vice-president, senior vice-president.

Q You mean to tell me that Mr. Lilker did not tell you you were mistaken as to what happened at the presentation of the prostaglandin presentation?

A Well, I don't know. Nothing happened. We made a presentation. What happened was that we made a presentation. As I said yesterday, afterwards, you have sort of a postmortem and you discuss it and some people come over to you and say it went very well and other people have already walked out and you think of how you could have done better. I felt we could have done better. Maybe Jay said he thought it went well, I don't know.

Q He never say that to you, that he thought it went well?

A It is possible that he said that. It is possible.

Q Specifically, is it not a fact, since I think you testified yesterday that you read the depositions of the

corporate officers of KPR -- is that not correct?

A Yes, I read them, yes.

Q And in fact you read Mr. Lilker's deposition, is that not a fact?

A Yes.

Q Didn't he testify that McGee --

MR. PATTERSON: I object to this line of questioning. If Mr. Lilker's testimony is to be elicited, Mr. Holman has him under subpoena and should have called him on the plaintiffs' case. He has rested his case and now exploring evidence that is not in this case.

MR. HOLMAN: Come on.

THE COURT: Gentlemen, please conduct yourselves properly. What kind of language is that?

MR. HOLMAN: I withdraw that, your Honor.

THE COURT: The objection is sustained, but not on the grounds set forth by the defendant's counsel.

Q But it is your testimony, Mr. Kallir, that Jay Lilker was interrupted during his presentation by Josephine McGee, is it not?

A When I testified to the presentation, I didn't remember there were two presentations. In fact, almost none of us remembered there were two. What stuck in my mind were the two things. One, that I thought the real

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presentation, the big one should have gone better and more smoothly and more in a unified way and I was present at that and I remembered that the client had been quite upset about the interruptions and had told me about the interruptions and had said at certain moments he wished that Josie would sit down and let Jay talk. I absolutely blocked out the fact there were two presentations and that this happened in the client's presence but not in my presence.

What stuck in my mind is that the client was unhappy.

Q You are now testifying that it did not happen on March 8, 1973?

A March 8 was not -- I still testify to that, I was present at that.

Q But specifically you are not now testifying that Mr. Lilker was interrupted by Josephine McGee on March 8, 1973?

A She took over material that we had not assigned to her. She talked about things that we had planned for other people to handle.

Q Drawing your attention, Mr. Kallir, to your pre-trial testimony on Page 108, Line 9:

"Q Was there any other way in which the relationship was being jeopardized by the McGee

case?

"A. Yes.

"Q What other ways?

"A. Her behavior at public meetings in cutting off Jay Lilker who was her superior, who was the account supervisor, and making countless sarcastic remarks to Jay when he presented something.

"Q Where did this happen?

"A. At the Upjohn Company.

"Q At the Upjohn Company?

"A. Yes.

"Q When?

"A. Well, at the presentation that I was talking about before where we had a big meeting with the four people that I gave you before lunch, McKeown, Ross, Josie and myself. There were at least four of us.

"Q On what date was that?

"A. I don't know, I can look it up. It probably was in February," and I believe you supplied the two dates.

"Q Can you supply us with the date?

"A. Yes.

"Q What were those remarks, the substance of

them?

"A. The substance was a series of interruptions and disagreements with Jay's part of the presentation. Jay's way of preserting it, the content of what he was presenting to the extent afterwards Bernie Shea told me he wished already, he wished she would sit down and let Jay, who was after all her superior, finish the presentation and also, that it looked like hell to a client to have a formal group of at least four people from New York come in with something to them extremely important and competitive -- by the way, we were not the only ones presenting. There was another agency presenting, so it was a competitive situation, and then have members of this supposedly unified agency team with a big auditorium filled with Upjohn people witnessing it, publicly disagreeing and fighting with each other. Fighting is a bit too strong, but disagreeing.

"Q Didn't you say this was held in an auditorium?

"A Yes."

Mr. Kallir, are you making reference to the presentation of March 8, 1973?

A When I testified to this, two things merged in my mind. What the client had told me and what I saw myself.

The presentation I was present at did not go the way I wanted it to go and there were interruptions and particularly there was too much of Josie and not enough of the other people and I couldn't very well interrupt. I sat on the sidelines and saw it happening and saw it going off the tracks. I was there and that is what I testified to.

THE COURT: What was the nature of these interruptions to which you refer at the time you were present which as I understand it was the March 8th presentation, is that correct?

THE WITNESS: Right.

I don't think there were interruptions. The interruptions were at the other meeting, but Josie, as I just said, took over material that had not been intended for her, that should have been presented by others.

THE COURT: That is in March, March 8?

THE WITNESS: Yes. And sarcasm there was plenty.

THE COURT: By whom?

THE WITNESS: By Josie. That was her relationship to Jay. It was a very sarcastic one.

THE COURT: Jay was Mr. --

THE WITNESS: Mr. Lilker, her superior.

THE COURT: Senior vice-president?

THE WITNESS: Yes.

Q But there were no interruptions, is that correct?

A I don't think so..

Q I draw your attention to Page 112 of your examination before trial, Line 14:

"Q Do you recall how many remarks she made?

"A No.

"Q Did you more or less -- were these remarks made in a loud tone of voice?

"A Yes, by all means.

"Q A shouting tone of voice?

"A Not shouting, but they were interruptions.

"Q Did Mr. Lilker stop his presentation to respond to her?

"A Oh, yes. I don't know how he responded. I am not sure but I think he responded by stopping. I think she in fact took it away from him. I'm not quite sure."

A That is it, that is right. She took material that was not intended for her.

MR. PATTERSON: Your Honor, apparently there seems to be some confusion in counsel's mind. He has not recognized the fact that Mr. Kallir has already stated in his earlier testimony he was confusing the first time and the second presentation. If his question is whether or

not these actions ever occurred. I have no objection but if he is now pursuing this and saying did these actions occur at the second presentation, I think Mr. Kallir amply testified they did not and he is confused as to which presentation they did occur at when he gave his deposition. We are just pursuing and endless and useless line of questioning.

THE COURT: I will allow the question.

Q If it is true you were very disturbed about the first presentation, why did you have Josie come out on March 8, approximately two weeks later and have her make this big presentation in front of an auditorium filled with Upjohn executives?

A That is a good question. That is a question we had to face when we decided we couldn't take her off the presentation, she was part of it and we thought that with all the people there and the solemn occasion and importance in our relations with the Upjohn Company, that the importance of this occasion would prevail and that she would be part of the team, but obviously it occurred to us after the dress rehearsal did not go the way it should have gone, whether she should be part of the big presentation. Of course we considered that question. Q In other words, you testified you had a discussion with someone else, about the possibility of not bringing Josie to Kalamazoo on March 8, is that what

you are telling the Court?

A Yes.

Q Who did you have that discussion with?

A I think probably with everyone in the executive committee informally.

THE COURT: Mr. Holman, would you suspend for a moment?

(Recess.)

BY MR. HOLMAN:

Q Can you tell the Court when you had these conversations with members of the executive committee relative to raising the question of whether to bring Josie to Kalamazoo on March 8?

A I can't give you a date but we didn't have that much time to decide how to handle it but after all, she was the senior account executive on the account and we wanted her on the account and --

Q Didn't --

THE COURT: I don't think he finished his answer. Won't you please allow him to finish?

MR. HOLMAN: I don't hear him sometimes when he trails off. I am sorry.

A If the client tells you there was a hitch, that things did not go as he had hoped they would, obviously it

is a discerning piece of news and you then ask yourself how should we react to it. We decided that Josie was the account executive and that we were in the midst of preparing the presentation and that she had to be the one to go out with us as the account executive and make the final presentation. It was discussed. I can't tell you the exact days. It occurred to us to not take her out to the final presentation.

Q Warren Ross is an officer of your company?

A Yes.

Q He is chairman?

A He is chairman of the executive committee.

Q Is that his only title with Kallir, Philips, Ross, Inc.?

A Senior vice-president.

Q He is a principal shareholder, isn't that correct?

A Yes.

Q So are you, isn't that correct?

A Yes.

Q And isn't it correct you own about 40 percent of the stock of Kallir, Philips, Ross?

A Roughly.

Q Did you ask Mr. Ross' advice on this question?

A Yes. I just said yes.

Q What did he say to you and what did you say to him?

A I don't remember. I can't reconstruct the whole conversation. I can only tell you that it occurred to us to make the real presentation, the final presentation without Josie and we decided against that. I suppose there were pros and cons brought up by various people.

Q On March 13, 1973, were you still bothered by the incident as you have described and testified concerning the prostaglandin presentation?

A Yes. I don't know what date it was though.

THE COURT: That was the date of the conference before the Commission here in New York City, I believe. Is that correct?

MR. HOLMAN: Yes, your Honor.

Q Were you concerned about the prostaglandin presentation on that day?

A I was concerned -- no, about the presentation, no.

Q It is a fact you didn't see fit to inform any of the parties on March 13, 1973?

A It was passed. I was concerned about our relationship to the Upjohn Company. The presentation was passed.

Q Isn't that one of the reasons why you eventually

had to suspend her?

A What is the reason?

Q Isn't the prostaglandin presentation one of the reasons you had to suspend her?

A Yes.

Q And you didn't think it was important to tell the New York City Commission on Human Rights at a fact-finding conference in a case concerning the very person who was the subject of your concern?

A The prostaglandin presentation was passed. Her behavior was not passed. There is nothing to discuss about the presentation to the City Human Rights Commission. I certainly did talk with them about Josie's behavior, yes.

Q You are testifying now that you told someone at the New York City Commission on Human Rights and that you were concerned about the prostaglandin presentation.

A No.

Q I am sorry for putting words in your mouth.

MR. HOLMAN: I apologize to the Court as well.

Q In other words, your testimony is, you didn't tell anyone at the New York City Commission on Human Rights --

MR. PATTERSON: Objection as to the form. It is either his testimony or not. Mr. Holman I should ask him questions.

MR. HOLMAN: I will withdraw the question.

Q At any time have you ever told any person connected with the New York City Commission on Human Rights about the prostaglandin presentation?

A Not that I remember, no.

Q When was the first time you told anyone outside of the offices of your company or your counsel about the prostaglandin presentation incident as you have described it?

A I can't give you a date. I don't know. In talking to our attorneys, I don't know.

Q I mean outside of conversations with your attorneys. I'm not making reference to that.

A I don't think I ever did. I don't think I have discussed it much with anyone. With people outside --

Q Did Mrs. Morales -- you were here for her testimony?

A Yes.

Q Didn't she testify that she asked you why you suspended Josephine McGee?

A Yes, that is right. She called me on the telephone, that is true.

Q What did you tell her at that time?

A Well, she called the day after we suspended

Josephine and said Josie is in her office right now and what is this all about and I told her that -- oh, I think before I said anything she said "I am calling you because I have to decide if this is now retaliation or not," and I said I am not a lawyer and neither is she. In my opinion it isn't because she would be on full salary and full benefits of any other employee but we can't have her poisoning our relationship with an important client and that is why we have asked her to stay home and she said you are paying her full salary and I said yes and she said for how long and I said indefinitely and she said you know, these things have a way of dragging on. It may not be resolved as quickly as you may hope and I said that is okay and if it is an open-ended thing, that is fine, and that was it. That was the end of our conversation. I volunteered to send her a Xerox of the memo which she referred to but which she didn't have yet.

Q By the way, that memorandum, when did you distribute that to the employees of your company?

A When it was actually distributed, I can't tell you. I can only tell you the date. I cannot remember. I would think on the date that it is dated. Maybe the following day.

Q It could have been distributed on March 28, is that

didn't tell me that.

Q When she told you she was thinking of doing likewise, what did you say to her?

MR. PATTERSON: Objection. He has testified twice now she never said that to him. That was the impression he received.

THE COURT: Counsel thinks it is important. I will allow him to pursue it but really I think this is getting to be aimless almost at this point. Finish your line of inquiry on this subject, please.

MR. HOLMAN: Yes, your Honor.

Q What effect did the Phyllis Korzilius letter have on your relationship with the Upjohn Company?

A I would say ultimately none.

Q Did it ever have any effect on your relationship with the Upjohn Company?

A We were afraid that it would, yes.

Q Did you ever receive any information from any officer or employee of the Upjohn Company that led you to believe that your relationship with the Upjohn Company was in jeopardy?

A No.

Q Never?

A No.

Q Not even the slightest piece of information?

A If the client tells you our relationship is in jeopardy, either he tells you or he doesn't. It is no slight bit of information.

MR. HOLMAN: No further questions of this witness.

THE COURT: Does the Commission have any questions?

MR. GONTAREK: Yes, a few.

EXAMINATION

BY MR. GONTAREK:

Q I have a few questions about the March 25 trip to Kalamazoo.

The purpose of that trip, I think you testified was to inform the client that you made a decision to take Josie off the account, is that correct?

A Yes.

Q Did you decide to go to Kalamazoo that day or decide before?

A Before.

Q Do you recall how long before?

A I think on Tuesday or Wednesday of that week I called and I didn't know when -- I only talked to Bernie Shea. I called Bernie Shea and told him I would like to come out as soon as possible and it is my recollection that was a Wednesday and he said to come out on Friday.

Q The 22rd was a Friday?

A That would have been on the 21st.

Q You told him you were going to come out Wednesday, possibly Tuesday, or was it Wednesday?

A I think it was Wednesday. It was that week.

Q So you must have made up your mind you were going to take Josie off the account earlier in the week, Tuesday or Wednesday?

A Early that week.

Q And you were going out to Kalamazoo to clear your decision with the client?

A Yes.

Q In fact you wouldn't have changed your decision unless they told you specifically they wanted Josie to stay on the account?

A Yes.

Q So the factors that went into your decision were factors that you knew about as of say March 19 or 20?

A Yes.

Q And that whatever they told you whenever you went out there on March 23rd, played no part in your decision?

A No.

MR. GONTAREK: No further questions.

THE COURT: Redirect, please?

REDIRECT EXAMINATION

BY MR. PATTERSON:

Q Mr. Kallir, you testified to the activities that were reported to you that occurred at the first presentation at Upjohn, is that correct?

A Yes.

Q Who communicated those activities to you?

A Mr. Shea.

Q I wish to read a portion of Mr. Shea's testimony and ask you if this accurately represents what Mr. Shea told you.

MR. HOLMAN: I will object to that.

THE COURT: Objection sustained.

MR. PATTERSON: Excuse me, your Honor?

THE COURT: Objection sustained.

MR. PATTERSON: I didn't hear his objection.

THE COURT: He is objecting to your reading into evidence the testimony of Mr. Shea.

MR. PATTERSON: On what grounds? Isn't this the testimony of a witness taken under oath? Which witness cannot be produced?

THE COURT: It hasn't been read into evidence by anybody. That isn't the way to introduce it. You were asking him if his testimony is true.

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MR. PATTERSON: I am asking him if this was said to him.

THE COURT: Put the question to the witness what was said at that time. We are going to conduct a seminar on how to put questions to witnesses and that applies to both lawyers. Please follow the rules.

Q Specifically, what did Mr. Shea tell you in describing what occurred at the first presentation?

A Mr. Shea called me and told me that there were a number of things that had not been covered by the presentation that had nothing to do with who said what, had nothing to do directly with Josie, so we talked about what else should be in the presentation. This had nothing to do with the case. Then he said there seemed to be some secret talk of war going on with Josie winning and interrupting Jay and that he thought this would be a very bad thing if it happened at the real presentation.

THE COURT: Who was Winnie?

THE WITNESS: A tug-of-war going on which Miss McGee seemed to be winning.

THE COURT: I thought you used a person's name.

THE WITNESS: No.

Q At the time you made the decision to take Josie McGee off the account, were you concerned with the possibility

of the escalation of these events, vis-a-vis, the agency-client relationship with Upjohn?

A Yes.

MR. PATTERSON: No further questions, your Honor.

THE COURT: The witness is excused.

(Witness excused.)

THE COURT: We'll take our mid-morning recess.

(Recess.)

(Continued on next page.)

THE COURT: Please call the next witness.

MR. PATTERSON: At this time, your Honor, the defense would like to offer the deposition of Bernard Shea taken pursuant to the plaintiffs' notice at Kalamazoo, Michigan. Mr. Shea, as is stated in this deposition is a resident of the State of Michigan and presently more than 100 miles from the district and is not here to testify.

THE COURT: Are you offering the entire deposition?

MR. PATTERSON: I am offering it and I intend to read a small portion of it, your Honor.

Referring to page 10 of that deposition --

THE COURT: First shouldn't you show that the witness was called and sworn before a notary with his name for the record and his address?

MR. HOLMAN: Does your Honor want a copy of the transcript?

THE COURT: Don't you need the copy for yourself?

MR. HOLMAN: I have a copy, your Honor.

THE COURT: That would be helpful.

MR. PATTERSON: The witness Bernard Shea was called as a witness and was first duly sworn and testified before a notary public qualified in the State of Michigan.

Mr. Shea testified that his residence was

8339 --

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THE COURT: Read the question.

BY MR. PATTERSON:

"Q State your name for the record.

"A Bernard C. Shea.

"Q Your residence.

"A 8339 Broodwood Drive, Portage, Michigan.

"Q Are you presently connected with the Upjohn Company?

"A Yes.

"Q What is your job?

"A I am group manager of product promotion.

"Q Is that the same job you held in the first four months of 1973?

"A Yes."

Proceeding on to page 10 of this transcript, approximately mid-way down the page.

"Q Will you tell us the substance of that meeting if you could," and that is referring to the meeting he had with Mr. Kallir and Mr. Henry on March 23, 1973.

"A Yes. John told us that Josie had -- you know, been taking an action against Kallir, was in an action against Kallir over discrimination, civil rights activity he told us he discussed it with us, the background of it. We had heard a good deal of it before he got here."

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Going on to page 13 of the transcript, the last question on that page.

"Q In the March or April meeting, what specifically was discussed in relation to the action penind between McGee and Kallir, Pilips?

"A Let's see. John told us that Josie had or was going to file some kind of action against Kallir. He explained that he wanted to fill Fred Henry and I in so that we from the company standpoint wouldn't be dealing with rumor. I explained to him that we had essentially heard all this from one source or another, various Upjohn people had mentioned it to me."

Proceeding to page 17 of the transcript, your Honor.

"Q You had mentioned before that you had heard talk around Upjohn about Miss McGee's problem with Kallir, Philips?

"A (Nodding head.)

"Q How did you learn that information?

"A I don't know precisely, you know, who the person was that told me, but it was rather wide-spread knowledge and I do remember that and numerous people knew about it and for several days was the subject of casual conversation amongst a number of people that knew Josie. At this point

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in time I can't tell you precise names. I am sure I discussed it with Jim Penrose."

At page 21 of the transcript, the first question on that page.

"Q Did he ever give you a reason for either discharging or suspending Josie?

"A Well, I heard the reason but I can't recall if he gave it to me.

"Q What was that reason?

"A The reason as I understood it for suspending her, if that is the right word, is that she in addition to filing this action had become a disruptive influence around the agency. I can't recall if I learned that from John or one of our people or where."

Proceeding to page 24, the last question on that page.

"Q Do you recall how Josie acted during that presentation?

"A Yes, I do, the first one. The first presentation I do.

"Q The first one?

"A Yes.

"Q How about the second one?

"A I can only answer it by making a contrast. At

the first presentation I was disturbed because Josie was interruptive of Jay Lilker, contradicted him. She was disruptive of the presentation. I don't know why. I was concerned that would happen at the second one and to the best of my knowledge, it didn't. I don't recall seeing what happened at the second one."

THE COURT: "Seeing that happen at the second one."

You have to read the balance of that, don't you?

"A The second presentation to the best of my knowledge went along in a competent manner."

Proceeding on to page 26, approximately two-thirds down.

"Q Did any of the employees of Upjohn mention to you that anyone was solicited for letters by Josie" --

MR. HOLMAN: I would object to the admissibility of that.

THE COURT: Where is that?

MR. PATTERSON: About two-thirds of the way down, your Honor.

THE COURT: Objection sustained on the grounds of hearsay.

MR. PATTERSON: Page 29 the question which begins about the middle of the page:

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"Q One other thing. You have testified that the agency-client relationship was not in absolute jeopardy as a result of whatever problems the agency was having with Josie. In other words, the agency was not going to lose the account because of that. In your opinion as an executive of this company, would that account be in jeopardy if such persons as your company's chairman, president, were brought into this matter?

"A Yes."

MR. HOLMAN: Objection.

THE COURT: I will take it as an expression of opinion.

MR. HOLMAN: May I state my grounds even though I understand --

THE COURT: You may state your grounds.

MR. HOLMAN: This is a reference, your Honor, to an attempt on counsel's part to take certain depositions which was responded to by a motion for a protective order which your Honor had granted in this case. At the time this deposition was taken, your Honor, there was absolutely nothing in the case at that time that had any connection whatsoever to the question that he is asking. It was absolutely, totally immaterial and so much blatantly so on the part of counsel.

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THE COURT: Mr. Holman, wouldn't you give the Court enough credit for reading that answer in totality where according to counsel's own question, "You have testified the agency-client relationship was not in absolute jeopardy."

Why are you spending time on that?

MR. HOLMAN: I was not objecting to that portion.

THE COURT: You have to take the entire answer under the doctrine of completeness.

What se do you have?

MR. PATTERSON: I wish to read one small portion from a deposition of Fredrick Henry into the record.

MR. HOLMAN: At this time is the procedure for counsel for plaintiff to read portions --

THE COURT: At this point it would be proper for you to read such portions of Mr. Shea's deposition that were not read by Mr. Patterson.

MR. HOLMAN: Page 10, the bottom of the page:

"Q Did he tell you he was going to suspend or discharge Josie McGee?

"A I don't recall that he did. I recall that I learned that at some point but I don't remember whether it was at that meeting that I learned that.

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"Q Did he ask you about the value of Miss McGee on the account?

"A No, I don't think so, not that I recall.

"You mean was she performing well?

"Q Yes.

"A No, he didn't.

"Q Did he ask you if he can recall whether he asked for your permission to take Miss McGee off the account?

"A No, he didn't ask, not that I recall."

MR. HOLMAN: Your Honor, I believe there is no question at this point but it begins:

"Q Was there anything in relation to a job action discharge, demotion, transfer, suspension discussed with you, either you or Mr. Henry at that time?

"A I can't tell you more than what I learned because I don't know. I learned at some point that Josie McGee was going to be on the Kallir payroll but not on the account for a period of time and I don't know whether I learned it at the meeting or previous to that meeting or after the meeting. I don't recall the point in time, you know, whether it was at the meeting with John Kallir.

"Q Prior to this March 23rd meeting, Mr. Shea, had you initiated any discussions with Mr. Kallir in relationship to Josie McGee?

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"A Not that I recall, not that I remember.

"Q Do you know from your knowledge whether anyone from Upjohn had discussed with Mr. Kallir Josie McGee, the problems she was having with Kallir, Philips?

"A Not that I know of.

"Q Prior to this March 23rd meeting, do you know if there was anyone who initiated any conversation with Mr. Kallir from Upjohn in relation to the problems that Josie was having with Kallir, Philips?

"A I guess the correct answer would be I don't know. No, I don't."

MR. HOLMAN: Then I think counsel failed to complete an answer, your Honor if I am not mistaken. The question at the bottom of the page 13. The answer at the bottom of page 13 and the second paragraph of the answer, I don't have that as being read into the record.

THE COURT: What is the question?

"Q In the March or April meeting, what specifically was discussed in relation to the action pending between McGee and Kallir, Philips?

"A Let's see. John told us that Josie had or was going to file some kind of action against Kallir. He indicated he wanted to fill Fred Henry and I in so we, from the company's standpoint, wouldn't be dealing

rkrf 10

with rumor. I explained to him we had essentially heard all this from one source or another. Various Upjohn people had indicated it to me. I remember he felt very badly this had all taken place and he must have told us what he intended to do about it but I don't recall that he, I don't recall that I learned specifically at that meeting what was going to be done. It was a meeting where I felt he was trying to convey accurate information to us at the Upjohn Company about what had actually transpired and that is my -- the meeting was a long time ago -- that is my recollection of it.

"Q Do you recollect one way or the other whether you told Mr. Kallir it was the right decision to suspend Miss McGee?

"A Two things. I don't recall that he ever asked me that and secondly, I have made it a policy not to make personal decisions for agencies. I am sure I did not say that it was the right decision for him to suspend Miss McGee. I don't recall ever being asked to make such a statement. I feel very confident -- I was not asked to make such a statement.

"Q Mr. Shea, in previous testimony Mr. Kallir said that either you or Mr. Henry or both of you had said to him at that meeting, 'Don't worry, up until now we have

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liked Josie but Josie is not the account and you could put other people on the account and we will trust you that other people will do the account and by all means take her off the account.'

"Do you recall saying that to Mr. Kallir at that time?

"A I have no recollection, no recollection of a definitive statement of that nature."

The bottom of page 17:

"Q Was there any discussion of removing Upjohn from Kallir, Philips because of the problems that you know of?

"A No, there wasn't."

Page 19:

"Q Did she mention to you her action against Kallir, Philips at that time?"

May I add what he is referring to for clarification?

THE COURT: Yes.

MR. HOLMAN: During the early months of 1973.

"Q Did she mention to you her action against Kallir, Philips during that time?

"A I don't recall that she ever mentioned it to me.

"Q Had she ever asked you for a letter of

recommendation?

"A Not that I ever remember, no.

"Q Immediately after Josie being taken off the account, do you recall again whether she had any contact with you?

"A It is my best memory that she did not."

The bottom of page 22:

"Q I am sorry. The presentation on the determination of presenting Nancy.

"A There was a preliminary presentation that is made to ordinarily the promotion people and Fred Henry. This is a standard procedure.

"Q This is a small presentation?

"A Small presentation. The Kallir group, and I have memory at the first presentation of Josie and Jay Lilker being there, John Kallir and probably somebody else from Kallir but I don't remember who it was.

"Q Where was that held?

"A That was held here in this building in conference room R-1.

"Q Was there a second presentation?

"A In the auditorium. The first presentation was a small group. If we want changes made in it, we suggested the second presentation in the auditorium and that

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was made to the vice-president of marketing."

The middle of page 24:

"Q Tell us who made the presentation first?

"A The first presentation was made primarily by Josie McGee and Jay Lilker, to the best of my memory.

"Q Did Kallir make any remarks?

"A I am sure he did but I don't recall."

Page 30, your Honor:

"Q You have testified that you knew that Mr. Penrose and Miss Korzilius were solicted for letters or had heard I think by rumor?

"A Yes.

"Q At that point, was it common knowledge, was it known by the people who worked with --

"A I do remember this one fact that bears on that, that when -- I feel quite sure when Penrose wrote a letter to Josie, something about her performance, that he was not aware of the action between Josie and John Kallir. I think he wrote that letter without knowledge of that. Now, that is my best recollection on that.

"Q Do you know from knowledge to whom Josie had communicated her action against Kallir, Philips?

"A No."

MR. HOLMAN: No further additions, your Honor.

A Yes.

Q Were you in the first three months of 1973, a member of the executive committee of the defendant?

A Yes.

Q In March of 1973, were you in the capacity as a member of the executive committee consulted by Mr. Kallir relative to his action on March 26th removing Miss McGee from the Upjohn account?

A Yes, I was.

Q Were you asked for your advice and consent as to that action?

A Yes, I have.

Q Will you please tell the Court what your reasons were for consenting to the action Mr. Kallir took?

A My reasons essentially were as stated here over the past two days, that I felt that with client agency relationships being as delicate as they are and believe me they are very del cate, any type of behavior as was reported to me would jeopardize that particular account in the future. At some time along the way I think it would jeopardize the account and I think it interfered with the working relationships that the agency had with the client.

MR. PATTERSON: No further questions, your Honor.

CROSS EXAMINATION

BY MR. HOLMAN:

Q Mr. Cooper, did you have any connection whatsoever with the Upjohn account in your duties as a vice-president of Kallir, Philips, Ross?

A My connections are not direct. My connection is in my capacity as executive vice-president where I supervise, essentially supervise all of the account people.

Q Have you ever talked to Fred Henry?

A No.

Q Bernie Shea?

A No. Well, I have talked to him, I made small talk in the office, yes.

Q Limiting myself to conversations about business, Phyllis Korzilius.

A No.

Q Lawrence Hoff.

A No.

Q What did you know in March of 1973 from your own knowledge that led you to counsel Mr. Kallir as you just testified?

A I don't believe I testified that I counseled Mr. Kallir. I believe I testified that we discussed the issue among ourselves. I don't think that I counseled

him. It was a decision that was made jointly.

Q When did you have this discussion?

A Sometime in March, I can't remember the date.

Q The middle of March?

A I can't give you the date. It probably would have been several days before the final decision was made and before John went out to Upjohn to inform the people there.

Q You are sure about that?

A I am not sure about that. I said it was around that time. It could have been a day before, it could have been the same day.

Q But your recollection is you placed that conversation that you testified to on direct testimony, and I don't want to pin you donw, but more or less within a few days of the suspension of Miss McGee, more or less?

A The conversation where we decided to terminate or suspend Miss McGee, is that what you are referring to?

Q I am referring to the conversation you have testified about on your direct testimony and I ask you when that took place and you said to me, if I recall, and I don't want to put words in your mouth, that you don't recall exactly but it was around the time that you made the decision, within a few days, to suspend her. I am saying before she was suspended we had a conversation

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in relation to this, yes.

Q And your recollection as to the time, the point of reference being the suspension on March 26th, you said a few days before?

A I can only tell you I believe it was sometime in March. I can't give you an exact date.

MR. PATTERSON: I object to the relevancy of this line of questioning. He testified generally and that is as specific as he knows. I don't see how it is relevant.

THE WITNESS: We had many, many discussions during this particular period of time and I can't pinpoint which took place on which day.

Q So that if I understand you, it certainly could have happened around the middle of March? That was within a week and a half of the suspension?

A It could have.

Q If it wasn't three days, it was ten days?

A It is possible.

MR. HOLMAN: Your Honor, at this time I would like to go into new matter that has not been covered on the direct testimony and I would ask the Court to declare Mr. Cooper a hostile witness for the purposes of this examination.

THE COURT: I see no reason to declare him a hostile witness. You may go into new matter. I wouldn't preclude you from doing that but before you do, I would like to ask the witness one question based on his last answer on direct.

Can you state precisely just what it was that you felt interfered with the working relationship or could interfere with the working relationship between an agency and a client that led to the decision to suspend her?

THE WITNESS: Yes. It was reported to me by Mr. Kallir, and I discussed it with Jay Lilker as well, the presentation or the prepresentation that took place at the Upjohn Company, the disruptive behavior of Miss McGee at that presentation and this I think was the primary thing in my mind.

THE COURT: You may go ahead and go into new matter.

MR. HOLMAN: I would like to follow up with a couple of questions on this.

THE COURT: Go ahead.

Q Were you present at the March 13th factfinding conferences?

A Yes.

Q Were you also present at an unemployment insurance

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board hearing?

A Yes.

Q Is one of your functions at KPR dealing with unemployment insurance matters before the board, perhaps as the agency's representative?

A My function is to deal with all administrative matters.

Q So you have been to unemployment insurance hearings from time to time in your capacity?

A No, I haven't. This is the only time I have been. I don't think we have had another instance where I was called.

Q Do you know what an unemployment insurance board hearing determines?

A Whether the former employee is entitled to unemployment insurance, I believe.

Q Isn't it even more than that, and for clarification, that it is a determination by the board as to whether there was a discharge for cause or discharge for no cause?

MR. PATTERSON: I will object. This witness isn't competent to answer that question.

THE COURT: If he knows.

A I really don't know the answer to that.

Q What do you think you are supposed to do

when you go to an unemployment insurance board hearing?

A I was there to represent the agency. I was there with our attorney. Our attorney was handling the matter and I was there just as an agency representative. I am not an attorney.

Q Did you offer any testimony at that hearing?

A I don't believe I did.

Q Did you make any statements at all?

A I don't recall any.

Q Who made statements?

A As I say, our attorney was representing us and I guess he did most of the talking. I might have made a statement but I don't recall.

Q Did you testify at that hearing why you had terminated McGee?

A I don't recall that I did. I don't believe I did. I might have answered some questions that were put to me but I am not sure.

Q Isn't it a fact Mr. Cooper, to refresh your recollection, that neither you nor your attorney nor anyone from your agency testified about the prostaglandin presentation before the unemployment insurance board?

A I doubt whether that came up. I don't recall but I doubt whether we would have talked about the

prostaglandin presentation. Why would that be relevant?

MR. HOLMAN: New matter at this time, your Honor.

Q You are a member of the executive committee?

A Yes.

Q Did the executive committee have a meeting sometime in December of 1972 to discuss Miss McGee's request for an increase in salary?

MR. PATTERSON: I object to the relevancy of that.

THE COURT: There has been evidence here with respect to what transpired in December but I thought we were quite agreed gentlemen that the issue of discrimination because of lack of parity payments with males is not an issue in this case. Can't we really confine it to the issue of retaliation? I will take all of this if you offer it but I am trying to suggest to both lawyers that you keep your eye on the ball.

MR. HOLMAN: I feel this has a bearing with respect to the intent of the parties, credibility of the witnesses. I am not arguing it is relevant to the case in chief, your Honor.

Q Did you attend an executive committee session where that was discussed?

A I don't recall whether that was discussed in

an executive committee session or just at an impromptu meeting.

Q Did you ever testify or make a statement that there was a --

A In the deposition I probably said it was at an executive committee meeting.

Q But you can't say that now?

A I didn't say that definitely then. I said I thought it was at a meeting. We hold a meeting once a month. It may have been at a meeting, it might not have been at a meeting. We did discuss it and I think that is the key point that you want to get at. Did we discuss it, yes.

Q Your testimony is there was no formal executive committee session?

A We have a formal executive committee session once a month barring illness or other emergencies. Whether this was discussed at that particular meeting, I can't tell you.

THE COURT: Mr. Holman, I am sorry to say this to all parties that we have to interrupt this case but we have a note from the jury which will take a little while. What we will do is take our luncheon recess and resume at 2:15. It is one of these situations that develop.

(Luncheon recess.)

AFTERNOON SESSION

2:15 p.m.

N O R M A N C O O P E R, resumes the stand and testified further as follows:

CROSS EXAMINATION

BY MR. HOLMAN (Continued):

Q In other words, Mr. Cooper, you don't recall whether the executive committee discussed McGee's salary increase request in December of 1972?

A I believe it was discussed in December of 1962 but I don't know whether it was at a formal executive committee meeting or an impromptu session.

THE COURT: You said 1962. I assume you meant 1972.

THE WITNESS: Yes.

Q Did you press an opinion in 1972 that you didn't think McGee's request for an increase in the amount she had requested was warranted?

A I don't believe we discussed particularly the amount she requested. I believe --

Q Let me interrupt.

MR. HOLMAN: He is not being responsive. I asked him whether it was warranted.

THE WITNESS: I said I didn't think that the

amount was discussed. It might have been. I don't know. I think it was the general consensus of the group we would wait until the regular review time which was, I believe, in April or May and then discuss it again.

Q I see. In other words, your view at that time was not -- you expressed no view on the amount of increase, whether it was warranted or not? It was just as you are testifying, she had to wait her turn.

THE COURT: That isn't what he said. He said until there was an annual review of salaries, is that correct?

THE WITNESS: Yes.

Q My question again is, did you express a view to members of the executive committee in December of 1972 that your opinion was that the request for this increase was not warranted at that time?

A At that particular time, right.

Q Did you give a reason to the members of the executive committee?

A I imagine that I did. I think I was a little concerned with the manner in which the increase was requested. I was a little concerned with the amount of the increase and I felt that I would prefer to wait for the annual review which is a normal thing. I don't

think there was any question at that annual review she probably would have gotten an increase based on the performance.

Q Mr. Cooper, didn't I ask you at your examination before trial whether or not this increase in your opinion at that time was warranted?

A You might have. I don't recall.

Q Is it not a fact you testified at page 49 of your examination before trial:

"Q Why did you think it was not warranted?

"A Because her capabilities would not warrant that type of salary increase. First of all it would have reached a tremendous percent in increase and I personally would not have voted yes to that large an increase."

A Yes, that is true.

Q Do you recall testifying in your examination before trial relative to the question of deferring consideration until the annual review date?

A I believe I said the same thing then as I said now, that I voted that it should be deferred until the annual review.

Q Going back to one item you touched on this morning and I think your testimony was, and correct me if I am wrong, that you had discussed with Mr. Kallir and other

members of the executive committee some time in March of 1973, Josephine McGee's performance on the Upjohn account? Is that more or less your testimony from this morning?

A I don't know if we said performance or we discussed the behavior, more than the actual performance.

Q Did you ever discuss her performance on the Upjohn account in 1973 with members of the executive committee?

A I can't recall whether it was discussed in March or not.

Q Isn't it a fact, Mr. Cooper, that at your examination before trial, that you did testify that it was probably around that time that you did have a discussion of that kind relative to McGee's performance on her account?

MR. PATTERSON: I object to the form of the question.

THE COURT: Overruled.

Read the question and answer. It will save time that way.

Do you recall being asked this question and giving the following answer.

Q Do you recall being asked:

"Q Does that refresh your recollection as to whether the executive committee met and discussed Josephine McGee's performance on the Upjohn account? Do you understand

that question?

"A I can say probably around that time we did discuss it. I can't remember specifically meeting when we did but I remember we did discuss it around that period of time."

A I would think we probably did. We discussed the whole issue as I said several times.

Q If I recall your testimony from this morning, you said the main reason for suspending her was -- what was it, a presentation of some kind? Do you recall your testimony this morning?

A Yes. I think I said it was at the presentation on the prostaglandin.

Q And that was the main reason she was suspended, is that correct -- that was your testimony?

A I think that was one of the basic reasons, yes.

Q Did you read your examination before trial before coming here today?

A I read it in the past. I didn't read it today.

Q You have read it?

A Have I ever read it, yes, I have read it.

Q Do you recall being asked at page 11:

"Q What knowledge do you have, Mr. Cooper of any devisive behavior that Josephine McGee may have been

engaging in and as well, I know that she contacted several people at the Upjohn Company and asked for letters of commendation or recommendation, however you want to phrase it and I know she contacted several other women, female employees of our agency and discussed our situation with them."

Do you recall testifying to that?

A Yes, I do.

Q Do you recall making any reference whatsoever in your examination before trial to the prostaglandin presentation?

A I can't recall whether I did or not.

Q Weren't you asked time and time again for a statement of reasons as to why Josephine McGee was suspended and terminated? Is that not correct?

A Whether I was asked time and time again? I don't know. I know you asked that question as you did now and I gave some of the reasons why at the time which you just read.

Q Did you give as a reason during your examination before trial that Josephine McGee was being suspended because of her activity or conduct at the prostaglandin presentation?

A Specifically, I don't recall that I did, no.

Q It is a fact you didn't, you did not make such a statement at your examination before trial?

A I can say now that I don't think I made that statement.

Q Mr. Cooper, did you make an affidavit and submit it to this court with reference to this case?

A Yes.

Q The statements that you made in this affidavit are absolutely the truth, were made according to your knowledge of the case, is that correct?

A Yes.

Q I don't want to be putting words in your mouth but you did read all of the statements in this affidavit before you signed it?

A Yes.

Q And you did and are swearing to the truth of the statements in the affidavit?

A Yes.

Q Mr. Cooper, do you recall stating in your affidavit, "During the months following the filing of said charge, the movant began to conduct a campaign directed at the employees of the account she was supervising to obtain letters and statements of commendation as to her proficiency for the purpose of gathering

documentary evidence to introduce in support of her filed grievance with the Human Rights Commission of the City of New York"?

A Yes.

MR. PATTERSON: You asked him whether or not he made that statement.

MR. PATTERSON: I don't think the witness is in a position to remember a quote in an affidavit.

THE COURT: Let's not spend time. Show him the affidavit.

MR. HOLMAN: I thought I put quotes around it

THE COURT: Show him the affidavit, the original and ask him if he made that affidavit on the date in question. Do we have to go through that formal process? Is there any question he filed this affidavit and you as his attorney filed it or the attorney for defendant filed it?

MR. PATTERSON: He is being asked whether he remembers making a specific statement and I want him to read it.

THE COURT: Please get the original affidavit, show it to the witness.

MR. HOLMAN: I have given him a photocopy.

THE COURT: Maybe counsel for defendant will

object to the fact it is a photocopy.

MR. PATTERSON: I have no objection to the photocopy.

Q Is that your affidavit?

THE COURT: Did you sign and swear to that affidavit?

THE WITNESS: Yes, I did.

THE COURT: Call his attention to any statement that is contained therein.

Q Was it you opinion, Mr. Cooper, that these letters that you heard were being solicited with documentary evidence that Miss McGee gathered to introduce in support of her filed grievance with the Human Rights Commission of the City of New York?

A This was my opinion, yes.

Q Wasn't it also a reason you had stated in your examination before trial for Josephine McGee's suspension?

A That was part of it, yes.

Q Was that statement based on your own knowledge?

A I had no direct knowledge. I was informed of things as they went along but as I said before, I had no direct knowledge of it.

Q In other words, your affidavit is a result of your knowledge and information furnished to you by others?

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

A Yes.

Q Did anyone tell you that Josephine McGee was the only senior account executive ever to hold that position and supervise one account?

A Did anybody ever tell me that?

Q Yes, or did you know it from your own knowledge?

A I believe I know that from my own knowledge.

Q Did a man by the name of Ed Holland ever work for your corporation?

A Yes, he did.

Q Isn't it a fact, Mr. Cooper, that during 1972 Mr. Holland performed services for one account and that account was the McNeil Laboratories account; isn't that a fact?

A In 1972, yes, but prior to that he had worked also on another account called Beechem.

Q Why do you say each of the then senior account executives employed by the defendant had responsibility for one account and each of them had positions in the advertising field --

A Because it was true.

Q You mean because it was at that time you were making reference to the senior account executives?

A I don't understand what you mean.

Q How could it be true in the history of your company if Mr. Holland, also a senior account executive, had supervised only one account?

A I just told you that he did work on another account as well as the same time the Beechem account and besides that he had other responsibilities within the agency in terms of marketing and new business.

Q Are you absolutely certain that is a true statement as of 1972?

A As of 1972. Well, it was a true statement when he worked for us. As of a particular date in 1972, he might have been devoting his time to the one account. The McNeil account has made it clear to us that they prefer to have one person exclusively devoted to that account and I think at that time is when we decided that he would not work with Beechem any more but strictly with McNeil as well as doing other work within the agency not directly client related.

Q Mr. Cooper, are you aware you made the following statement in your affidavit, "During the month following the commencement of relief of absence with pay and benefits, it became apparent that defendant's difficulties with the movant's behavior were no closer to a satisfactory resolution and that the defendant was, by continuing the

movant at full salary and benefits in effect financing a farce against itself.

Accordingly, the responsible executives of the corporation terminated salary payments to the movant effective May 15, 1973 and her medical benefit plans furnished by the defendant lapsed as of June 14, 1972."

Did you make such a statement?

A I believe I did.

Q And it is a true statement, accurately reflecting the facts and circumstances surrounding McGee's case?

A It was what I felt at the time it was written.

MR. HOLMAN: Your Honor, at this time I would like to offer Mr. Cooper's affidavit as an exhibit for the plaintiff, if it is necessary to consider that as an exhibit. I ask it be marked Plaintiff's Exhibit No. 11, I believe.

MR. PATTERSON: I object to its offer. It is part of the Court's record at this point. It is part of the papers in the case.

THE COURT: You are suggesting there is no need to offer it, I can take judicial notice of it.

MR. PATTERSON: Yes.

MR. HOLMAN: If the Court --

THE COURT: Counsel doesn't object, so I will.

MR. HOLMAN: Does your Honor want a copy of what your Honor has taken judicial notice of?

THE COURT: I am sure I have the original files in chambers and I will look at it when I work on the case.

Do you have the affidavit in front of you now? I would like to look at it, please.

MR. HOLMAN: Yes. The back copy has writing on it.

Q What is your basis for knowledge --

THE COURT: Mr. Holman, I assume you offer these exhibits in evidence because you want the tryer of the fact to read them and presumably it has some value as far as your case is concerned. This is a four page affidavit and I think you ought to give me a few minutes to read it.

(Pause.)

THE COURT: Proceed.

Don't tell me you are asking for the last question again.

MR. HOLMAN: No, your Honor.

BY MR. HOLMAN (Continuing):

Q Mr. Cooper, is it still your testimony today that you have knowledge that Josephine McGee contacted female employees in your office relative to her charge before the New York City Commission on Human Rights?

A That was my belief, yes.

Q I hope I am not repeating myself, Mr. Cooper, but aren't you aware that you had stated:

"Q What knowledge do you have of any devisive behavior Josephine McGee may have been behaving in?

"A I know she contacted several people at the Upjohn Company" --

A I know she contacted Miss Korzilius for a letter because I know I saw the letter produced at the hearing, so I knew she had contacted her for a letter.

Q Could Miss Morales have contacted --

THE COURT: Miss who?

MR. HOLMAN: I withdraw the question.

THE COURT: Mr. Cooper, what objection did you have on behalf of Defendant to plaintiff's action for letters from the account, the client?

THE WITNESS: Well, I think it is a very delicate type of relationship, the agency-client relationship. I think any letters that are solicited or personal problems that are transmitted from the agency to the client 's just not a good thing for the agency to be in. If a client feels that a person is doing a good job on their particular account and they want to write to the company and say you think so and so is doing a fine job,

that is fine, but if the letters are solicited from the client, there must be some reason for doing that. Why would somebody just say send me a letter and tell me how good I am or tell me what my job should be unless there is a reason for that.

It is my feeling that this upsets that very delicate balance that we work with.

THE COURT: In what way does it upset it?

THE WITNESS: That possibly the client would then say why is so and so requesting a letter, what is the problem, why would my account executive need a letter, doesn't the agency recognize what a good job they are doing, why would I have to supply that letter and I think it raises questions in the client's mind as to what is going on at the agency if their account executive needs to solicit a letter from the client, there must be some difficulty.

THE COURT: Going beyond that. Assuming that the plaintiff told the Upjohn people, I do have this cliam of discrimination because of lack of parity payment with male employees, based on that assumption and if the question of her competency came up as one of the issues, how would that affect the relationship between Upjohn and your company?

THE WITNESS: I think just the fact that the client is brought into the internal problem of the agency has an effect. It has been testified that one or two people at the client said no, we would not fire the agency because of this, but I have had -- well, I guess over 20 years of experience in the agency business and I know when those things start and they are little problems and they build and I think it can be very destructive if a client feels that an employee of the agency is having a problem with the employee.

THE COURT: You think it is a disruptive influence in terms of relationship between the agency and the client?

THE WITNESS: Yes, your Honor.

THE COURT: Go ahead.

BY MR. HOLMAN (Continuing):

Q Do you draw any distinction between the soliciting of "documentary evidence" for purposes of furthering a claim before an agency such as the agency for the Commission on Human Rights and soliciting a testimonial for purposes of personal advancement or a change in jobs?

A I think there would be a distinction. I felt it was going to be used for the former purpose.

Q I am sorry.

A I said I would assume there would be a distinction, but I felt that the letter was being solicited for the former purpose.

Q Would it have been okay in your judgment if Josephine McGee was soliciting a letter, a testimonial letter because she wanted to get advanced, a change in job?

A No. Change her job?

Q Yes.

A Our employees if they want to change their job, they certainly wouldn't involve us. If the person is changing a job, that has nothing to do with us. I think if she asked for a letter of testimonial whether it was going to be used as documentary evidence or otherwise, I would feel the same way about it. I think this would be a disruptive, damaging situation as I explained to the Judge because the client then assumes why does my account person need confirmation from me, what is going on back at the agency and I think this creates a problem.

Q Your testimony is it would have been okay in your judgment if she was going to look for a change in job?

A No, that would be a moral. You ask would it be okay. Somebody is looking for another job, they do a lot of things. They go on interviews on the company's

time. We don't say that is okay. They are looking for another job.

Q You haven't terminated anybody that was engaging in these things?

A It doesn't involve a client. Whether it is right or not, is a different situation. We certainly don't approve of our people looking for other jobs at lunchtime but it doesn't involve another client and we usually don't know about it.

MR. HOLMAN: No further questions, Mr. Cooper.

THE COURT: Does the Commission have any questions?

MR. GONTAREK: No.

MR. PATTERSON: No redirect.

THE COURT: Witness excused.

(Witness excused.)

MR. PATTERSON: At this time, your Honor, the defense rests.

THE COURT: Any rebuttal?

MR. HOLMAN: Yes.

I call Phyllis Korzilius.

P H Y L L I S K O R Z I L I U S, called as a witness on rebuttal, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HOLMAN:

Q Where do you presently reside?

A I reside in Los Angeles, California.

Q Were you employed at any time by the Upjohn Company?

A Yes, I worked for Upjohn for almost 14 years. I terminated my employment there in August of 1973.

Q Do you know the plaintiff intervenor in this case, Josephine McGee?

A Yes, I do.

Q Did you know her in 1972?

A Yes. I think I met her first in 1969.

Q Did you know her in the early months of 1973?

A Yes.

Q What was your job at the Upjohn Company?

A Are you speaking now of 1973?

Q Yes.

A I was a product manager at that time and I handled sex hormones and cancer drugs.

Q Did you have an occasion, let's say between 1969 and 1973 to work with Josephine McGee relative to matters concerning Upjohn Company and their advertising agency Kallir, Philips, Ross, Inc.?

A Yes, but from 1967 on I was in the advertising marketing group at the Upjohn Company and my job from 1967 until probably close to the end of '72 was to work directly with various advertising agencies that the Upjohn Company used and in 1969, I think that is the year, the Upjohn Company started to work with Kallir, Philips, Ross and I worked with several people from Kallir, Philips, Ross from that time up until the time I left the Upjohn Company but I worked with them as an advertising or promotional person, then my job was upgraded at Upjohn and I became a product manager and I continued to work with that agency.

Q Did you frequent contact with Josephine McGee over that period of time you just described?

A Oh, yes, I did. Sometimes several times a week.

Q Josephine McGee, did she ever tell you she was -- that she had filed a claim of sex discrimination before any agency in the State of New York?

A Yes, she told me that.

Q What was your reaction, what did you say to her when she told you that?

A I told her I was for it. I told her I thought she had a lot of courage.

rkrf 50 Korzilius-direct

Q Did she ever give you instructions with respect to disseminating this information to other people?

A She told me just the opposite. Well, by that time, by 1973 Josie and I were friends so she told me this, I feel more in the sense of friend to friend than professional to professional and she made it quite clear when she told me that that this was something she was like confiding in me about, but she wanted to be very sure that I did not talk about it. I guess that is it.

Q Did she give you any further indication as to why she didn't want you to talk about it?

A I don't recall that.

Q In the early months of 1973 did anyone at the Upjohn Company make any comments to you suggesting that Josephine McGee had changed and couldn't understand what was going on and asked you questions of that nature?

MR. PATTERSON: I object to this question. I don't believe this is a proper subject of rebuttal.

THE COURT: Plus the fact it is hearsay. Objection sustained.

Q In the early months of 1973, what was Josephine McGee's reputation at the Upjohn Company?

A It was excellent.

Q Was there any change in that evaluation or that

reputation as you understood it?

A I was not aware of any change.

Q Did you ever hear any adverse remarks about Josephine McGee in those remarks?

MR. PATTERSON: I must object.

THE COURT: I don't know why the counsel put the question after she testified what the reputation was.

MR. HOLMAN: I just wanted a clarification.

THE COURT: Do you press your objection?

MR. PATTERSON: Yes.

THE COURT: Objection sustained.

Q Did Josephine McGee ever ask you for a letter of some kind during the early months of 1973?

A Yes.

Q I show you an exhibit already in evidence and ask you if you can identify it.

Is that the letter that you sent to Josephine McGee?

A Yes.

Q Did Josephine McGee tell you what she was going to use this letter for?

A I don't recall that she said specifically what she was going to use the letter for. She asked me if I would write a letter for her commenting on the way she

carried out her function and I said I would be happy to. I probably made some assumptions about the letter but I can't testify specifically about her purpose in wanting it.

Q In other words, you don't recall at this point whether she had mentioned at that time to you that she had any charges before any local agency or state agency in the State of New York?

A I don't know. We had talked about things but I can't say that she said that at the time she asked me for the letter.

Q How often did you talk to Josephine McGee about her claim of sex discrimination?

MR. PATTERSON: Your Honor, again I do not see the purpose of this as rebuttal. The intervening plaintiff has testified as to motivations for getting this letter. There has been no conflicting testimony. I assume all counsel is attempting to do is to have an additional witness for the defense. The defense has rested. He is not offering rebuttal testimony.

THE COURT: I will allow the question.

A Let's say if I talked to her five times, maybe once out of the five times. We had a lot of business to conduct --

Q Would you talk to her --

A Most of the time it was just business and once in a while we would talk about other things.

Q Did Josephine McGee act differently in your judgment based upon your experience with the account executives over the years of your employment --

MR. PATTERSON: Objection. There has been no testimony laid that she had any other experience with account executives.

THE WITNESS: I have had much experience with account executives.

MR. HOLMAN: Do we have a stipulation?

THE COURT: Please, gentlemen.

He withdraws his objection.

Was there any change in her work performance in the entire period you knew her? Particularly after December of 1972, was there any difference in her work performance?

THE WITNESS: No.

THE COURT: I don't think you have any other questions, do you?

MR. HOLMAN: No.

MR. GONTAREK: The Commission has no questions.

CROSS EXAMINATION

BY MR. PATTERSON:

Q Miss Korzilius, you testified over the course of your relationship with Miss McGee to the time she left the account you had gotten to the point where you were fairly good friends, is that correct?

A Yes.

Q Did this relationship continue after Miss McGee left the account in March of 1973?

A To some extent. We weren't -- we didn't see each other, but we did talk from time to time, yes.

Q Do you recall if during the period of say the end of March, 1973 to the middle of May of 1973 you had any conversations on the telephone or otherwise with Miss McGee?

A I probably did.

Q You probably did?

A Yes.

Q Do you know if during that period of time, if you had talked to her, the subject matter of the conversations?

A Specifically?

Q Well, is it fair to assume that after March 26, 1973, which is the day that Miss McGee was taken off

the Upjohn account, that any conversations you would have had with her would not have been business?

A They would not have been business.

Q Then it is fair to say they would have involved whatever personal things the two of you would have discussed?

A Yes.

Q My question is, during that same period of time, the end of March through the middle of May of 1973, do you recall whether in speaking to her you discussed what was transpiring with respect to her discrimination case or a retaliation case?

A I am sure we must have discussed some things. I can't tell you at this moment.

Q Do you recall if after Miss McGee was taken off the Upjohn account by defendant you discussed any aspect of her situation with anyone employed by Upjohn at the time?

A Would you please repeat the time.

Q I will rephrase the question.

After she had left the account, the end of March, do you recall if you had discussed Miss McGee with anyone employed by Upjohn?

A Yes, I did.

Q Would you recall approximately when that might have been?

A No. I can't recall approximately. I can recall that my boss came and asked me about what was going on.

Q Who was that?

A His name was Joe Heinomen.

Q It is your testimony he asked you what was going on?

A Right. He evidently had heard something.

Q Do you know if at that point in time, and I am talking about the period after Miss McGee left the account, if anyone else at Upjohn besides you and Mr. Heinomen were aware of the reasons why Josie had been taken off the account?

A Did I know at that time that other people were aware?

Q Yes.

A No. I know now because of the testimony but I did not know then.

MR. PATTERSON: No further questions, your Honor.

MR. HOLMAN: No further questions.

(Witness excused.)

MR. HOLMAN: Your Honor, at this time an

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,.
Plaintiff,

-and-

JOSEPHINE McGEE,
Plaintiff-Intervenor,

-against-

KALLIR, PHILIPS, ROSS, INCORPORATED, a New York Corporation,
Defendant.

74 Civil 3234 (EW)
75 Civil 401 (EW)

----------x

B E F O R E:

HON. C. J. HARTENSTINE,

Magistrate.

February 17, 1976
10:40 a.m.

THE MAGISTRATE: Do you know Mr. Lewis at all?

THE WITNESS: I went to him at -- I was contacted by the person in the promotion department for help for them, and while I was there I told him of my particular needs for a job, and he consequently told me.

THE MAGISTRATE: Who did, Mr. Lewis?

THE WITNESS: This person I contacted who I think it was Mr. Lewis told me that there were no positions available at Medical World News, nor none that he knew of in the industry.

THE MAGISTRATE: What's Mr. Vernon L. Lewis got to do with it? I don't think I understood. You did not talk with him?

THE WITNESS: Yes, I did.

THE MAGISTRATE: What does Mr. Lewis look like?

THE WITNESS: If he were in the room this minute I couldn't tell you, your Honor.

THE MAGISTRATE: Then how do you know you talked with him?

THE WITNESS: Because I must have made a note at the time some place which I don't have with

me, or there may be a letter if that's one of the letters.

THE MAGISTRATE: It's very important that we know precisely what you did and not something that looks like a who's-who for the advertising world or something of that sort.

These names are here I would think for some definite purpose like you saw them, you wrote to them, you had an inquiry of them, or something of that sort, otherwise it really isn't quite fair to have a list made up like this.

Now, if you saw Mr. Lewis, I would like you to tell me you did. If you did not, tell me that too.

THE WITNESS: I saw someone in the promotion department. I believe his name was Mr. Lewis. I can swear to nothing else.

THE MAGISTRATE: I'm very concerned that I'm not being led to believe something that isn't true here, and if you didn't see Mr. Lewis, I don't think you should have a list with Mr. Vernon L. Lewis at the top.

How about Dave Alman? Did you see Dave Alman?

THE WITNESS: Without looking at the names of the companies I cannot tell you, your Honor. In all honesty this is a very inbred industry. People go from company to company very quickly, and therefore I have to refresh my memory.

I am obviously not here to hinder the proceedings in any way, but I also don't want to say things that aren't so.

THE MAGISTRATE: All right, Mr. O'Dwyer, go ahead.

BY MR. O'DWYER:

Q Miss McGee, after you had made inquiry as to a job would you do anything?

A You mean to a specific company would I call back?

Q No. Would you make any notations or anything of that sort?

A Sometimes. I kept it if they had a card.

Q In terms of Medical World News?

A Yes.

Q Do you recall talking to anyone from Medical World News?

A Yes.

Q Do you recall any other positions that you

sought during the years 1973?

A 1973. I can give you places I remember I applied or inquired. Again, I can't be sure about years. Norman Craig & Kummel, which is another advertising agency, the Rockefeller University.

Q Let me stop you there.

THE MAGISTRATE: I hate to interrupt you, Mr. O'Dwyer, but I want to satisfy myself here just for a minute, if I may.

As I understand it, Miss McGee, you were no longer reporting for work at the defendant as of May 1, 1973.

THE WITNESS: March 26, 1973.

THE MAGISTRATE: That was the last day you were paid?

THE WITNESS: No. That was the last day I was permitted into the office, your Honor.

THE MAGISTRATE: The last day you were paid was --

THE WITNESS: April 30th.

THE MAGISTRATE: April 30, 1973.

THE WITNESS: Right.

THE MAGISTRATE: You were no longer working for the company as of May 1, 1973.

THE WITNESS: I did not know that until May 15, 1973.

THE MAGISTRATE: As of May 15th, you were no longer working with the company.

Starting shortly after that, did you ever draft a resume of your professional experience and personal background?

THE WITNESS: Yes.

THE MAGISTRATE: Do you have a copy of it?

THE WITNESS: There is one.

THE MAGISTRATE: May I see it?

MR. O'DWYER: Sure.

MR. PATTERSON: I find this production very interesting because in the course of interrogatories just prior to this hearing we asked for that to be produced, and we were told under oath that the copy of the resume is neither in the possessions, custody or control of the plaintiff or her attorney, and very interesting that they are now able to produce it.

MR. O'DWYER: Your Honor, under oath that was the answer at the time. Neither the attorneys nor Miss McGee could find it.

THE MAGISTRATE: When did it turn up?

MR. O'DWYER: After the interrogatories

and preparation for this trial.

MR. PATTERSON: Why wasn't it furnished to me?

THE MAGISTRATE: Do you have some explanation for counsel, Mr. O'Dwyer?

MR. O'DWYER: I don't have an explanation for counsel, your Honor. To be truthful with you, I found out about it today.

THE MAGISTRATE: You found out about the resume today, and you asked Miss McGee about a resume prior to this day for the purpose of answering the interrogatories?

MR. O'DWYER: I did.

THE MAGISTRATE: And her answer to you was there was no such resume?

MR. O'DWYER: Your Honor, the answer to us was that she had made up a resume. She could not find it at home.

THE MAGISTRATE: And that was something that she swore to as answering interrogatories?

MR. O'DWYER: As answering interrogatories? No, as a matter of fact I think I answered the interrogatories in that way.

THE MAGISTRATE: All right. Well, now

would you show Mr. Patterson a copy, if you have one here?

May I see it?

MR. O'DWYER: I only have one copy.

THE MAGISTRATE: All right.

Where is the original of this?

THE WITNESS: With the agency.

THE MAGISTRATE: What agency?

THE WITNESS: Is there a letter?

THE MAGISTRATE: What agency, Miss McGee?

THE WITNESS: Archer Agency.

THE MAGISTRATE: Well, let's see now, your testimony is that you drafted a resume. When did you put it together? When did you draft it?

THE WITNESS: There were various times. It wasn't the same one all the time, your Honor. I did not have enough money to have it run off all the time. As the occasion arose I would have it run off. I did not have a typewriter. I did not have paper.

THE MAGISTRATE: When did you?

THE WITNESS: That one was for late May 1975, and it was called to my attention because my phone was disconnected at that time, and a

friend who is --

MR. PATTERSON: I move to strike this colloquy.

THE WITNESS: The reason was because I was supposed to be withholding information under oath.

MR. HOLMAN: If it please the Court, I have to excuse myself to go to a pre-trial with Judge Bryant.

THE MAGISTRATE: By all means.

I don't know about going down the familiar road of looking for jobs in the traditional manner, but it strikes me one looks for a job by preparing a resume, perhaps writing letters of inquiry, perhaps making visits to offices and so on.

Don't you think we could have some inquiry along that line? It may not be that she did it in that way, but at least it might be a start.

MR. O'DWYER: Your Honor, what I am getting at is the positions applied for and the approximate dates we made in response to I think our motion for --

MR. PATTERSON: Your Honor, if Mr. O'Dwyer is seeking to put this in, I have no objection to it.

THE MAGISTRATE: Pardon?

MR. PATTERSON: If he is seeking to put in

the record this list which has been annexed to answers to interrogatories to show that Miss McGee made some effort to seek employment at these various places at or about the dates indicated, I have no objection, and she can look at the list and say, "Yes, I did."

THE MAGISTRATE: Suppose we do that? It might be very helpful.

Mr. O'Dwyer, do you want to offer the list?

MR. O'DWYER: Let me say this, your Honor.

THE MAGISTRATE: Let's offer the list and then if Mr. Patterson says he has no objection, we can mark it in evidence, and then you can inquire of Miss McGee, and she can refer to the list.

xxx

(Positions applied for and approximate dates received as Plaintiff's Exhibit 10 in evidence.)

(Hearing adjourned at 4:35 p.m., to February 19, 1976 at 10:00 a.m.)

* * *

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

(RTR 155)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	:	
and	:	74 Civ. 3234 (EW)
JOSEPHINE McGEE, Plaintiff Intervenor	:	
-vs-	:	
KALLIR, PHILLIPS, ROSS, INC., a New York Corporation, Defendant.	:	

February 25, 1976
10:30 A. M.

BEFORE: HON. C. J. HARTENSTINE,
U. S. Magistrate

APPEARANCES:

O'DWYER & BERNSTIEN, ESQS.,
Attorneys for Plaintiff Intervenor
BY: THOMAS HOLMAN, ESQ.,
and
BRIAN O'DWYER, ESQ.,

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500 Fifth Avenue, N. Y. C.
Attorneys for Defendant
BY: EDWARD S. PATTERSON, ESQ.,

A In May of 1973.

Q 1973?

A Yes.

Q And have you sought other employment after that?

A Yes, I did.

Q Where did you go in May of 1973, if you can remember?

A To Sidcom. That's an audio-visual company, and the actual name I don't remember; it's like Counsel for Interdisciplinary Communications.

That was the first place I went to.

Then I think soon after that --

Q Let me ask you about that:

Do you remember who you saw there?

A Susan Meister.

Q Was this contact by telephone or in person?

A In person.

Q Would you tell me what occurred at that meeting, as best as you can remember?

A Well, I told her I was out of work --

THE MAGISTRATE: Well, did you really go in and say "I am out of work?" Do people usually do that? Don't they usually negotiate from strength

and say "I'm looking for a job," and pretend that they are still employed?

THE WITNESS: It's a small industry, and I couldn't pretend, really, your Honor.

THE MAGISTRATE: You just went in and said "I'm out of work and I'm looking for something?"

THE WITNESS: Yes.

And I had just finished a seminar in February of 1973. There had been previous seminars I had worked on in 1972, and I was preparing one, another seminar, with Warren Ross.

So it appeared to be a growing segment of the industry, and Sidcom also seemed to be a growing company, and I felt I could use the experience I had gained there.

BY MR. O'DWYER:

Q Did you communicate this to Miss Meister?

A Yes.

Q What was her answer to that, if any?

A They had no opening at the time.

BY THE MAGISTRATE:

Q What prompted you to go there if there was no opening? What was the thing that prompted you to go there?

slcg 5 McGee-direct

A Well, I didn't know they wouldn't have an opening.

Q What prompted you to go there, a newspaper advertisement?

A No. It was known as an up and coming company. It was new.

Q In your area of experience?

A Yes.

Q How did you know that?

A Again through industry contacts. You say, who got the -- who is doing the seminar on, you know, sports injuries, say, for instance. In fact, I think Susan Meister had done one on sports injuries, and since that had been the topic of a seminar I had just been working on, we were aware it was also being done some place else.

Q I want you to know what my thoughts are, if it makes any difference to you.

Judge Weinfeld wrote that your qualifications and expertise to perform your functions were not in dispute at the hearing and trial before him.

He also said that the back pay to which you are entitled is to be reduced by the amount you earned or recently could have earned in other employ-

ment since your discharge.

Now, I am trying to make a point to you. I want you to understand what I think is involved here, and I think it's very important, one of the most important points of the case.

As I said, Judge Weinfeld apparently did say your qualifications and expertise to perform your functions are not in dispute. Apparently you're qualified in the work that you were doing.

He goes on to say that you are to receive back pay reduced by the amount you earned or reasonably could have earned in other employment since your discharge.

Now, it seems to me we want to find out what reasonably could have happened. Looking for places where there are no openings, you would have to have some sort of reason for that, I would think, and that's why I asked you: Why did you go to a place where there is no opening?

A I didn't know there was no opening.

Q All right, then what prompted you to go to the place and then you found out there was no opening?

A Because they had a reputation for expansion.

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So if there was expansion, and I had experience in the area, I felt I would be considered. I mean, I had proof in an area that was just opening up; I had experience.

Q Then I ask you, too, why do you go in and sort of lay yourself open as having nothing to offer; for all you indicated, you had just been fired. Is that the sort of approach you would have towards looking for a job? "Look, here I am without employment."

As I say, it seems to me people usually go looking for jobs and they don't reveal that they are not working at the time. They don't mean to be dishonest, but I am talking about a reasonable effort to find a job. If you do everything to indicate the people that you are not desirable, it seems to me you are not doing what is reasonable --

MR. HOLMAN: Your Honor, with all due respect --

THE MAGISTRATE: I am not asking you a question; I am asking the witness.

MR. HOLMAN: Just a statement on the record, with all due respect.

To the best of my recollection I would look for a job similar to the one that I had, but I was willing to take usually by that time anything that would pay the rent and keep me in medicine and food.

Oh, there was another agency --

THE MAGISTRATE: I don't think we have any dates on the agencies.

MR. O'DWYER: All right.

Q How about Fanning? Do you remember the date?

A No, I don't. I would think probably 1974.

Q Early or late?

A I don't know.

Q Did you go to Fanning in response to a specific job or was it in general search?

A In general search, since I was willing to take a general job.

Q How about Front Desk? Do you recall the date?

A No, I don't. That is a receptionist only agency, and that's what I had been reduced to, applying for a job as a receptionist.

Q When was that, if you recall?

THE MAGISTRATE: I think it is a proper area of inquiry, the circumstances of the loans.

By that I mean it may be that they were loans but she never paid them back and didn't have to, and were what might be called income. If it doesn't turn out that way then it is not in the case.

BY MR. PATTERSON:

Q Did you borrow any money from any commercial lending institutions such as banks or finance companies?

A Yes.

Q From whom did you borrow?

A Chase Manhattan Bank.

Q Do you know when that was?

A I had an extended credit, one in '73 for a thousand, which was then extended for another thousand. I believe it was after the trial, so that would be '75.

Q Any other commercial lenders?

A No.

BY THE MAGISTRATE:

Q And did you have to pay it back?

A You pay -- you know, you're supposed to

just keep depositing into a checking account, and they-- I don't know how to explain it. On extended credit --

Q I don't mean for you to explain it; I mean you are under an obligation to repay all the money?

A Oh, yes. When the money is there I have to replace it.

BY MR. PATTERSON:

Q Did you receive any loans from individuals who were either friends or relatives of yours?

A Yes.

THE MAGISTRATE: Just a minute. I don't understand that. Why is that in the case, Mr. Patterson?

MR. PATTERSON: Your Honor, again I am asking these questions primarily for the purpose of the credibility of the witness.

THE MAGISTRATE: I see. All right.

MR. O'DWYER: Your Honor --

THE MAGISTRATE: I think it's relevant. In other words, the question bears on the reasonable efforts to obtain other employment and the pressures and pulls that might have exerted themselves on her at that time.

MR. PATTERSON: That's right.

THE MAGISTRATE: I think it's relevant.

Q Ms. McGee --

MR. O'DWYER: I don't want to interrupt Mr. Patterson, but I do want to raise my objection.

We were over this already in the pretrial interrogatories, at which time we raised our objection to that question, and your Honor directed that we not be required to answer that question.

It seems to me that your Honor has on the record information to decide whether Ms. McGee made reasonable efforts to find employment.

Now, motivation is not in issue here in the sense that she has to make reasonable efforts to find other employment.

Now, whether she was making a thousand dollars a week from loans or making nothing, her obligation is to make reasonable efforts to find other employment.

THE MAGISTRATE: Okay, I think I have your point.

Were you going to say something, Mr. Patterson?

MR. PATTERSON: Your Honor, it is the

defendant's position, and we will prove before this hearing is over that Ms.McGee did not make conscientious efforts, and we are trying to determine why she did not make conscientious efforts, and we are trying to show by her testimony now that she didn't have to make those conscientious efforts because she was not pressed for the dollars, and I think it is relevant, your Honor.

THE MAGISTRATE: Well, through these hearings I kind of go a little forward and then I recede a bit, and I think this is one where I am going to recede a bit. I think Mr. O'Dwyer has a point when he says that the pressure of the case itself is sufficient, and what other motivations she may or may not have had are not really relevant. In other words, it's reasonable within the context of the case and not within the context of life generally, and I think maybe we should not go into that.

MR. PATTERSON: I respectfully except, your Honor.

BY MR. PATTERSON:

Q Ms. McGee, have you lived in the same apartment since May of 1973 through today?

A Yes --

MR. O'DWYER: Again, the case law, it seems to me,is clear. Ms. McGee is not subject in the three year period to know each and every ad that appeared in the New York Times. If Mr. Patterson can connect up the fact that Ms. McGee saw a specific ad and did not apply for it, that is relevant. I can bring in by this afternoon case law which indicates that.

THE MAGISTRATE: Well, I disagree, and I think it's relevant to know the state of Ms. McGee's efforts, and one of them is probably the state of her knowledge with respect to employment opportunities at the time.

I think your objection should be over-ruled.

Go ahead with the question.

BY MR. PATTERSON:

Q Do you recall the question, Ms. McGee?

A If there was an ad in the New York Times --

Q Or anywhere that you saw that said pharmaceutical advertising agency seeking account executive or senior account executive, or even assistant account executive, would you have inquired about that job?

A If my phone was working and --

Q Ms. McGee, would you have inquired about that job? I don't need your snide remarks about your phone working or not working. There is no evidence in this case that your phone was not working --

MR. O'DWYER: I am going to object to that.

MR. PATTERSON: I am tired of having this witness put her own colloquy in the record, your Honor, about how poor she is and how poor she has been.

THE MAGISTRATE: Let me see:

I think, Ms. McGee, you should not offer gratuitous little remarks like "if my phone was working," because it doesn't add anything to the record at all.

Mr. Patterson wants to know did you, or in certain circumstances would you have done this; and the answer, it seems to me, is yes or no, and to tell us about your phone only enlarges the record and does not advance the case.

So please try to confine yourself to the question and make a direct answer as best you

can.

A Yes, I would have answered such an ad, and the reason I made the comment was that the Archer resume was made from a neighbor's phone. My phone was turned off at that time, and --

MR. PATTERSON: I move to strike the last, again.

THE WITNESS: I could not make an appointment --

MR. O'DWYER: I object --

THE MAGISTRATE: Just a minute.

The last part of the answer is stricken from the record as being not responsive and wholly gratuitous. And I am trying to explain to you, Ms. McGee, what we are aiming at here. We are not concerned with how you did something. The question is, did you do it? And Mr. O'Dwyer may find how you did it mitigated against the success of your efforts, and he will bring that out on redirect.

If Mr. Patterson asks a question, answer it directly, please.

MR. O'DWYER: Your Honor, if I might - and I want to take exception to the ruling in the sense that I think it was very responsive. Mr.

Patterson asked: Would you have responded to the ad? And Ms. McGee said, "Yes, I would have if my phone was working."

MR. PATTERSON: That presumes that there was a requirement to make a phone call; that she couldn't go to a pay phone and put a dime in.

MR. O'DWYER: He is asking for a certain amount of speculation, and she is giving an answer as to when she would have replied to the ad.

MR. PATTERSON: Let me pursue that point with her.

I am willing to pursue that area and let her answer stand if her telephone was working.

THE MAGISTRATE: All right.

BY MR. PATTERSON:

Q Ms. McGee, if your telephone was not working would you go to a pay phone or to a neighbor's phone to answer an ad for a job?

A If I knew of the ad, yes.

Q Have you, since May 1973, on a reasonably regular basis been following the employment section of the New York Times?

A Yes.

Q Now you have shown on Exhibit 10 in evidence

and through your oral testimony that you spoke with or visited or applied to approximately 19 organizations, excluding employment agencies, in the period from May of 1973 right through today?

A Right.

Q Is that correct?

A Yes.

Q And this list is correct to the best of your recollection?

A Right, at that date.

Q Are you still looking for a job, Ms. McGee?

A No, I am not.

BY THE MAGISTRATE:

Q When did you stop looking?

A When I asked to be reinstated.

BY MR. PATTERSON:

Q When was that?

A That was September, I believe.

BY THE MAGISTRATE:

Q What year?

A 1975.

BY MR. PATTERSON:

Q You mean from September 1975 through this date you have made absolutely no efforts for re-

employment?

A You are going to object to my answer --

Q Ms. McGee, answer my question yes or no.

MR. O'DWYER: Your Honor, first of all, I am going to object to Mr. Patterson's demeanor. He is badgering the witness --

MR. PATTERSON: Your Honor, I have a witness who is not responsive --

THE MAGISTRATE: I don't think he is badgering her, but I don't think there is a requirement that she answer it yes or no.

The question has already been asked and answered, it seems to me. It seems to me her statement is on the record that she stopped looking for work when she asked for reinstatement; and she asked for reinstatement in September of 1975, and that's her testimony.

BY MR. PATTERSON:

Q Isn't it a fact, Ms. McGee, that you actually asked for reinstatement in December of 1974 when you entered this lawsuit?

A I don't know. If that's a legal paper --

Q That is your answer, Ms. McGee; I don't want an explanation --

would have responded to?

MR. O'DWYER: I am going to object to that, your Honor.

THE MAGISTRATE: Why?

MR. O'DWYER: Again he has to bring forth, number one, whether she would have seen it --

THE MAGISTRATE: The question is, Mr. O'Dwyer, whether, had she seen it, this is the sort of ad she would have responded to.

The objection is overruled.

Would you have?

THE WITNESS: Because of the other qualifications which you didn't mention, Mr. Patterson, I would not have applied for this job.

BY MR. PATTERSON:

Q What other qualifications?

A It says "Must have print and some broadcast experience," and neither of which I have.

Q You have neither?

A No.

Q Let's take this one, for example: This, I guess, is an abbreviation for "advertising account exec."?

A Yes.

(Recess.)

THE MAGISTRATE: Do we have any redirect examination, Mr. O'Dwyer?

MR. O'DWYER: There is no redirect.

xxx BY THE MAGISTRATE:

Q Ms. McGee, I would like to ask you a few questions:

When did you for the first time take the position that you had started looking for a job?

A As soon as I received the letter from Kallir, Philips, Ross telling me I would receive no more checks.

Q When was that?

A In May of 1973.

Q Did you start on a campaign to find a job?

A Yes, just that month I went to that Sidcom.

Q Did you draft a resume at that time?

A Yes, I believe so.

Q Did you type it yourself?

A Yes, but I had to use a typewriter at the church. I didn't have one at home.

Q And did you make copies?

A Yes, I Xeroxed.

Q How many Xerox copies did you make?

A I would usually make about 10 at a time because they cost 10 cents each.

Q So all in all how many did you make?

A In the three years?

Q Yes.

A Oh, God -- I am sorry -- I would say about a hundred.

Q And you made them about 10 at a time?

A Yes.

Q So is it your testimony that you used at least 80 or 90 resumes?

A I had them. They would be lost; they would be around the apartment; I might have given them to somebody in case they knew someone.

Q Regardless of how, did you use 80 or 90 resumes?

A I no longer have them. I don't know whether I used all of them by sending them out.

Q Did you draft a letter of transmittal for resumes?

A No, I did not.

Q Did you just send a resume with no letter accompanying it?

A The letter would have to be individualized.

Q So for each resume you sent out you wrote a letter to go along with it?

A Yes.

Q Did you type that yourself?

A Yes.

Q Did you keep a carbon copy?

A Sometimes.

Q Do you have those carbon copies?

A Unless my attorneys have them, I don't have them.

Q Do you have them?

A No. In my possession, no, I do not.

Q Do you have the original resume that you typed that you made the Xeroxes from?

A No, I do not.

Q Did you keep a correspondence file of all the letters that you sent out resumes with?

A No, I did not.

Q How many letters would you estimate you sent out?

A In three years?

Q Yes.

A I really couldn't say.

Q Well, approximately?

A Approximately 20, maybe.

Q And what would prompt the letters?

A If I were not going to have a face to face interview or if it was a box number, as Mr. Patterson has shown an ad, that would obviously entail a letter. But if it was to call and make an appointment I would bring a resume and not have a letter.

Q So one of the things that would prompt a letter would be a box ad in the paper?

A One of the things, yes.

Q What else would?

A If it was --

Q What else did actually prompt a letter from you?

A Asking for an appointment, similar to the Archer letter.

Q You would write a letter asking for an appointment?

A Yes.

Q What would prompt you to write the letter asking for an appointment?

A An ad or knowledge --

Q Well, we have covered the ads. I am thinking of something else.

MR. O'DWYER: Now I am going to object, your Honor, on the basis of probative value and relevancy.

THE MAGISTRATE: Overruled. I think it is quite all right so far. He is asking whether someone in the field heard of someone else in the field. That seems relevant to me and certainly competent.

A I have only seen their name in the Sunday Times Classified.

Q Do you know if they are a competitor of the Jerry Fields Agency?

A No, they are not.

Q Have you ever heard of Benson Personnel Agency

A No, I have not.

Q During the course of the calendar year 1974 could you estimate the number of account management people your agency placed with employers?

A Well, in the year 1974 I can only tell you the income that the agency had. We billed in the account management area --

MR. O'DWYER: Just a minute.

I move to strike as non responsive

THEMAGISTRATE: No. She is going to tell

us, I think, how she can give an answer to the question; and if at the end of the answer it is not satisfactory, you can move to strike it, but I think she is getting around to explaining how she can answer it.

Would you please?

A We billed approximately $150,000 to $200,000 in the account management area in New York City, and we base it on -- you will have to help me to do the arithmetic -- we charge between 10 and 15 percent on each account executive supervisor job.

So I would say 1974 was a fairly good year, a very good year for the account management area.

Q How does that work out as to the numb of people, approximately, that you might have placed?

THE MAGISTRATE: So 15 percent of some figure is equal to what you billed, $150,000?

THE WITNESS: Yes.

THE MAGISTRATE: Will you do the algebra for us, Mr. Patterson?

Q That would be about two million and a quarter?

A No. Say 15 percent of 150,000.

MR. HOLMAN: That is $20,000.

MR. PATTERSON: Oh, I thought we were extrapolating up, I am sorry.

THE MAGISTRATE: Correct me if I am wrong. She said the income was $150,000?

THE WITNESS: Correct.

THE MAGISTRATE: And the percentage to reach that amount was 15 percent?

THE WITNESS: 10 to 15 percent. So if you divide I can tell you how many I count of people we placed.

THE MAGISTRATE: So 15 percent of X equals $150,000?

THE WITNESS: Right. That does not mean, by the way, that we filled every position we were called into.

BY MR. PATTERSON:

Q Well, would you estimate 100?

A It is more than 100. Probably a thousand people. In other words, we placed a thousand people; approximately a thousand people.

Q In your division, account management marketing?

A Account management marketing, yes.

Overruled.

Would you give your estimate?

THE WITNESS: Would you repeat the question?

Q Would you tell the court what the job market for account management people was between May of 1973 and the fall of 1975?

A Well, I would say until the summer of 1975 it was very good.

Q By very good, what do you mean?

A That the market was very active -- and I am talking about advertising agencies -- very active looking for account people, account executives, assistant account executives, all the top. I would say most of the top major advertising agencies had their doors open to account people anywhere from $15,000 to $25,000.

Q During this period of time, to your knowledge, based on the instructions given to you by companies who retained your services, were there any specific preferences in terms of people who they were looking for for management positions?

A That would depend on who was looking; but, again, you know, the top agencies had their doors open, which really means any time you see

somebody who is bright, who is a good marketing person, please send them over.

Aside from which most of those agencies, which I can name, will see anybody with account management experience at any time under $25,000.

Q In the course of your employment with the Fields Agency have you had occasion to place people in account management jobs in the Ethical Drug Field?

A Yes,we have.

Q Could you tell the court from your experience what the difference between an account management job in Ethical Drugs and an account management job in consumer products is?

A Well, if you're talking about an account executive in Ethical Drugs, the only difference is the distribution of the product. Consumer package goods or consumer goods consist of goods that are sold over the counter, whereas Ethical Drugs are primarily by prescription through a doctor.

Q In the course of your job function with the Fields Agency have you placed any people with Ethical Drug account experience in consumer goods jobs?

that I am not expecting him throughout this hearing to agree with me at all.

MR. HOLMAN: Just to follow Mr. O'Dwyer's line --

THE MAGISTRATE: The second point is: Are you going to continue to cross-examine, because the reporter has his obligation and counsel have theirs.

Are you going to call the witness back again tomorrow?

MR. PATTERSON: I had no intention of doing that if we can possibly finish.

THE MAGISTRATE: Can we try to finish today so she won't have to come back tomorrow?

MR. O'DWYER: I have no further questions.

THE MAGISTRATE: Do you have any further questions, Mr. Patterson?

MR. PATTERSON: I have no redirect.

THE MAGISTRATE: I have a few.

XXX BY THE MAGISTRATE:

Q Now, when you place people from your agency is it the result of a telephone interview?

A No. It's the result of a person to person interview.

Q So that a person to person interview would include what?

A It would include making an appointment, and that person, that candidate or that applicant coming in to see me or seeing somebody in my department.

Q And they would bring with them what, anything?

A Just a resume.

Q Do they have to have a letter of recommendation?

A No.

Q A letter of reference?

A No.

Q Just a resume?

A Yes.

Q And then you conduct a personal interview?

A Yes.

Q And at that time you ask whatever questions you think are appropriate?

A Right.

Q If someone telephones and says "I saw an ad in the paper," or "I am interested in something in your field," would you place them without an inter-

view?

A No.

Q All right. Now in your experience is it unusual for people with agencies to place on the basis of telephone inquiry?

A No.

Q Is that the practice in your industry?

A No, it is not.

Q Now, taking it on the basis of in house hiring as distinguished from going to an agency, do you know whether they hire by way of telephone interviews?

A When you say in-house hiring, would you explain?

Q I mean, for example, suppose instead of going to you and then to an advertising agency someone went directly to the agency, and suppose they were hired, would they be hired if they merely telephoned or merely wrote a letter, in your experience?

A Absolutely not.

Q What would they have to do?

A They have to get an appointment and have a person interview them, generally with several people within the agency.

Q And if they come with a resume, is that an adequate documentary background, or do they have to have more?

A Well, no, because generally the agency will check on the references themselves.

THE MAGISTRATE: Any other questions, gentlemen?

MR. PATTERSON: Nothing further, your Honor.

THE MAGISTRATE: All right, you need not come back tomorrow.

We will adjourn until, say, 10:15 tomorrow morning right here, and we will try to finish.

MR. PATTERSON: I have one more witness who should be about the same length as the last one, your Honor.

THE MAGISTRATE: All right.

This is off the record.

(Discussion off the record.)

THE MAGISTRATE: We will reconvene this afternoon at my request, and we will allow Mr. O'Dwyer a few questions along that line that he feels is important that I foreclosed on a ruling.

Now will you ask the next question please,

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Mr. O'Dwyer.

MR. O'DWYER: Thank you.

XXX BY MR. O'DWYER:

Q Miss Mann, I will ask you what were the names of the 30 or 40 Ethical advertising agencies?

MR. PATTERSON: Objection.

Your Honor, the witness never said there were 30 or 40 Ethical advertising agencies.

Q How many Ethical advertising agencies are there in New York?

A Probably, I would say, anywhere from, just as a guess, anywhere between eight and sixteen, sixteen or seventeen. That is a long range, but that is what I would estimate.

However, the question --

MR. O'DWYER: No further questions.

MR. PATTERSON: Just a minute. I have one question on redirect.

THE MAGISTRATE: Just a second, please.

Mr. O'Dwyer, I am sorry, I didn't hear. Do you have another question?

MR. O'DWYER: No.

MR. PATTERSON: He said no further questions.

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A-205

(RTR 343)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, -and- JOSEPHINE McGEE, Plaintiff Intervenor, -vs- KALLIR, PHILIPS, ROSS, INC., a New York Corporation, Defendant.	:	74 Civ. 3234 (EW)

New York, New York
February 26, 1976
11 A. M.

BEFORE: Hon. C. J. HARTENSTINE, U. S. MAGISTRATE

PRESENT:

PAUL GONTAREK, ESQ.,

THOMAS HOLMAN, ESQ.

BRIAN O'DWYER, ESQ.

EDWARD S. PATTERSON, ESQ.

[illegible] district court reporters, U.S. [illegible]
[illegible] square, new york, n.y. [illegible]

I just don't like to spend the money, and this is what I am supposed to be there doing.

I maintain an active file of account execs that I have made for the last ten years; I follow them up to find out where they are; I have sources that I use to find out where these various people are; and I used the telephone and call them and ask them if they are interested in talking to us.

Occasionally I will use employment agencies.

Quite frequently I will advertise.

Q Where do you advertise?

A New York Times, and occasionally Ad Age.

Q I show you, Mr. Braunworth, eight sheets of paper which have been marked collectively Defendant's Exhibit B for identification and ask you to go through them and tell me if you can identify those documents?

A These are all ads that I personally have placed in the New York Times for various jobs.

Q Were those particular sheets of paper prepared by you, the ones you are holding in your hand?

A Or my secretary -- you mean in terms of the cut out and scotch taping, my secretary would have

The plaintiff intervenor should not be charged, in any event, with being knowledgeable or looking for employment at a salary quite a bit lower than her previous salary.

THE MAGISTRATE: That may be so, but I think it depends on the circumstances as the record may disclose them.

At one point it may be that a person would start out looking for a job at the same salary or even better than she had, but as time goes on and opportunities seem limited, it is not unreasonable to assume that she will start looking in the lower range, as a reasonable person. And I think "reasonableness" is one of the words Judge Weinfeld used and that we are to apply.

MR. PATTERSON: If your Honor pleases, she has testified that she was so desperate she was looking for receptionist jobs. So Mr. O'Dwyer's comment is completely outside the testimony of his own client.

THE MAGISTRATE: All right, bearing in mind the ruling that I made - and it may not be correct, but it's the ruling of this hearing - would you ask the question in accordance with that.

slcg Braunworth--direct (RTR 387)

THE MAGISTRATE: Overruled. I think he is competent to testify to that.

Q Do you recall the question?

A 1973 and 1974 were fairly good years for our end of the business particularly -- everything is relative -- 1975 stunk terrible, and I guess I should answer it in a general way in terms of the job market, in terms of account executives, my expertise would be knowing people who left the company, and what company they went to, and I do have that information if anybody wants it, and I knew the people I hired, and I would say that it was an active job market in 1973 and 1974, and the reverse in 1975.

Q To your knowledge during that same period of time was there any preference given to minority candidates by the agencies in your field?

MR. O'DWYER: I am going to object. I think now --

THE MAGISTRATE: On what ground is that, Mr. O'Dwyer?

MR. O'DWYER: Again, on the question of expertise. If it is in terms of his - what the purpose was in terms of his particular agency, I have no objection.

assume that, say, half of the account executive ads might be out of town.

Q Of the others how many of those were for Ethical advertising as opposed to consumer advertising?

A Not too many. Mostly were consumer.

Q Most were consumer?

A There would be occasional Ethical Drug, and included in that you would see pharmaceutical company ads from time to time also looking for copywriters, by the way, and the product management people, advertising people.

Q But for an account executive -- by the way, the two or three a week, would that include account executives, supervisory account executive and assistant account executives as well?

A I think my answer should be in the general area of account management, because it means so many things to different people. So my response is account management.

Q Again, approximately how many advertising agencies in New York deal exclusively with Ethical advertising?

A I would say 12 to 14 with billings over five million.

Q Again, can you name them?

A Sure.

Q Can I have them?

A Are you ready to go?

Q It is up to you.

A William Douglas McAdams; Sudler and Hennessey; Klemptner, Corbett,a division of BBDL; Kallir, Philip, Ross; Becker; Rosenthal.

I guess you could put in Durling & Wirtz; Kimmich & Weinstein; John Mann has an agency; Burdick was around at the time.

Q That is out of existence now, isn't it?

A It closed last year. It was around at this time.

Medicus, a division of Benton & Bowles; Deltakos, a division of J. Walter Thompson; Grey Medical, division of Grey; Health Mark, division of Medcom.

Is that about 14?

Q I didn't keep count.

A There is another one up in upstate New Jersey -- what's his name -- I can't think of his name offhand, but a long ten or twelve word name, I can't spell it.

Q So I take it a person who is looking for a job in a pharmaceutical advertising agency, that person can't simply go to the Red Book and look at some index and find immediately all 15 or so pharmaceutical advertising agencies?

A When you say that person, if you're talking about an experienced Ethical Drug advertising professional, he or she will know the names of those agencies and will zero right in on William Douglas McAdams, Sudler and Hennesey --

Q A person who is looking at the Red Book is looking for the names of people within the agency?

A I would think so, in most cases, yes; who is the person I should contact for a job at?

Q A person who is not so much looking for the names of agencies that might have job openings that might be in the relevant field -- what I am trying to ask you, isn't it a different kind of tool that one uses to get jobs; it is not -- you wouldn't know, you couldn't find out job openings in the Red Book, could you?

A Oh no. That is just a listing of advertising agencies, as I indicated before.

Q So before you go to the Red Book you have to know either the pharmaceutical advertising agency's name, or you have to know from some independent outside source that there is a job opening in that agency before you go to that book, right?

A That is kind of a double barrel question here. If you're looking for a job, and I am an advertising person, I will go to the Red Book and find out who is the creative director of XYZ company, who is the executive vice president of McAdams; maybe this is the person I should apply to for an account executive position.

So that's the first answer to your question.

I am looking for a source. Anybody looking for a job, where do you go? This is where you go if you're an advertising person. It has been that way forever. That's the bible. That's the reason -- well, not the reason, but for years that's where you go.

In the legal profession maybe you got your own sources where you go to look for a job. This is it for advertising people.

Q You have testified that in the Advertising Age not too many of the jobs listed in the account

management area are jobs in the Ethical advertising field, isn't that correct?

A That's correct.

Q Thank you.

I want to go back to November of 1973, and I believe it was, when you interviewed Josephine McGee for the job - I think it was on the Roche account - and you testified that you remember from that interview a discussion of the charge that she had filed, or something to do with her sex discrimination case against Kallir, Philip, Ross.

How much of that do you remember from that interview?

A I really can't say that I remember an awful lot because, don't forget, I have been down here three times in a row, and my memory is going to be flavored a little bit about this.

I do recall she brought it out, though.

Q Would the fact that she had a charge pending or a case pending against Kallir, Philip, Ross have anything to do with your reason for not hiring her?

A Of course not.

Q You testified that the primary reason that she wasn't hired was because you hired someone from

A Oh boy --

Q Well, would you expect her to see --

A 500. I would send out 500 resumes. I would easily do that.

How many would see me based on my background and experience, I would dare say -- I am trying to answer this question and not be out of order myself -- but I heard testimony yesterday, I heard two Ethical Drug agencies mentioned, and I already enumerated at their behest 15 and some others that to my knowledge she had not contacted. It seems to me if I were looking for a job as an account executive with a speciality in Ethical Drug advertising, I would contact the Ethical Drug advertising agencies.

Q And you named --

A 14 or 15, and I thought of four more.

Q So there are some 20 in the field; you would expect that many contacts at least?

A Absolutely, and also clients.

Q And any more than that would be beyond what you would expect?

A No, sir. In the Ethical Drug field, yes, 20, but you are talking about 500 more agencies in consumer advertising, or, realistically speaking,

to certain law schools have a tougher row to hoe when it comes to going out and looking for jobs; they got to make an extra special effort.

Now, if McGee's experience were such that she had to make an extra special effort, it might not be unreasonable that for two and a half years she didn't find a job.

A You asked my opinion based on everything I have heard.

You know, for somebody out of work for two years to make 19 contacts in which two are Ethical Drug advertising agencies, does not imply to me a very strong looking for a job, in my opinion.

Q Would you expect someone in the field to be out of work for two and a half years?

A No, absolutely not if this person has --

Q How long would you expect them to take to find a job?

A With professional expertise some people will go a month, some people will go up to six months. I have somebody from my own organization who has been looking for six months now.

Beyond that, if you have got some talents

MR.HOLMAN: Can he put it in a question?

MR. PATTERSON: If he would let me finish what I have to say, Mr. Holman, I may put a question.

THE MAGISTRATE: Please, let's try to finish this now.

Finish the question, Mr. Patterson, and then we will see if it is objectionable.

Q I telephoned you with respect to Ms. McGee; do you recall that?

A No, I do not.

Q All right, fine.

Miss Salmaggi, is Norman, Craig and Kummel what is commonly known as an Ethical Drug advertising agency?

A No.

Q Does Norman, Craig and Kummel have any clients who are in the Ethical Drug field?

A I believe they may have a client who is, but we don't handle the product.

Q In 1974 I believe you testified when Ms. McGee approached you about employment, did you know if Norman, Craig and Kummel had any clients who were in the Ethical Drug field that you were handling?

MR. HOLMAN: Your Honor, I am going to have

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff, -and- JOSEPHINE McGEE, Plaintiff-Intervenor, -against- KALLIR, PHILIPS, ROSS, INC., Defendant.	74 Civ. 3234 (EW) 75 Civ. 401 (EW) MAGISTRATE'S DETERMINATION OF DAMAGES

Plaintiff-Intervenor Josephine McGee was dismissed from her job as senior account executive by the defendant, Kallir, Philips, Ross, Inc. (KPR), an advertising agency, in May, 1973, after she filed a sex-discrimination complaint against KPR with the New York City Commission on Human Rights. After a non-jury trial, the Honorable Edward Weinfeld, District Judge, found that the discharge was retaliatory and thus violated Section 704(a) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-3(a), and held that McGee was entitled to damages including back pay and fringe benefits of employment at KPR. 401 F.Supp. 66 (S.D.N.Y. 1975).

Judge Weinfeld referred this case to Magistrate Charles Hartenstine for determination of damages due to plaintiff-intervenor, including back pay, medical expenses, pension and profit-sharing benefits, while reserving decision on McGee's request for an order reinstating her at KPR. Magistrate Hartenstine held post-trial hearings on damages on February 17, 18, 25 and 26, 1976.* After Magistrate Hartenstine's untimely death in July, 1976, this matter was transferred to the undersigned for a report and recommendation by Judge Weinfeld's order of July 30, 1976.

I. BACK PAY

The back pay awarded to an employee who is a victim of a violation of the Civil Rights Act should be sufficient "to make [the victim] whole for injuries suffered on account of unlawful employment discrimination." Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975). Under 42 U.S.C. §2000e-5(g), the plaintiff bears the burden of proving the gross amount of back pay due, while "the burden of going forward to mitigate the liability or to rebut the damages claim rests with the defendants." Sprogis v. United Airlines, Inc., 517 F.2d 387, 392 (7th Cir. 1975). Specifically, back pay awards are to

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* The transcript of this hearing is cited hereafter as "Tr."

be reduced by defendant's showings of "[i]nterim earnings and amounts earnable with reasonable diligence by the person or persons discriminated against." 42 U.S.C. §2000e-5(g).

A. Gross Amount of Back Pay

At the time of her discharge, Ms. McGee was receiving an annual salary of $18,000. To make her whole, the Court must assume that had she not been unlawfully discharged, her salary would have been increased in the years after her discharge. Of course, any calculation of the pay increases that might have been forthcoming is by its nature speculative. However, "[n]o mathematical certainty is required in the computation" of back pay under Title VII, Kaplan v. International Alliance of Theatrical and Stage Employees, 525 F.2d 1354, 1362-63 (9th Cir. 1975); the discretion vested in the court by Title VII includes the authority to calculate a reasonable estimate of back pay where certainty is not attainable.

In estimating the pay increases that Ms. McGee would have received had she not been discharged, Ms. McGee's own past salary history with KPR might be used. However, her rise to an $18,000-a-year position was meteoric; starting at a rather modest salary of $8,000, she more than doubled her

income in just over five years. Such a dramatic rise within an organization is difficult to continue, especially once an employee has already reached a rung in the corporate ladder as high as Ms. McGee's last position. Interpolating Ms. McGee's 1967-72 percentage increase to 1973-76 might yield an unrealistically high estimate. Therefore, the calculations on which my conclusions are made proceed under the assumption that the percentage increases which the other account executives and senior account executives received from 1973-76 are reasonably close to those which Ms. McGee would have received had she remained with KPR. See Satty v. Nashville Gas Co., 522 F.2d 850, 855 (6th Cir. 1975). The calculations are more fully set forth in the Appendix. The total gross back pay due Ms. McGee, exclusive of any reductions for interim earnings or monies which would have been earned through a reasonably diligent search for other employment (before interest), is $68,411.32.

B. Reduction of Back Pay

The plaintiff-intervenor having established her entitlement to this sum, the defendant must demonstrate that back pay should be reduced by interim earnings and amounts which Ms. McGee could have earned by exercising reasonable diligence

in seeking other employment. 42 U.S.C. §2000e-5(g).

(1) Interim Earnings

It is established by stipulation of the parties that the only income Ms. McGee earned from employment in the period 1973-76 was $1,400, from her part-time typing job with the Girls' Clubs of America. (Tr. 181) This sum should be deducted from the gross amount of back pay.

There is a substantial question as to whether unemployment compensation received by the victim of discrimination should be deemed "interim earnings." Several cases have held that it should be so considered. E.g., Satty v. Nashville Gas Co., 522 F.2d 850, 855 (6th Cir. 1975); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 721 (7th Cir. 1967); Diaz v. Pan American World Airways, Inc., 348 F.Supp. 1083, 1084 (S.D. Fla. 1972). However, the better view seems to be that unemployment compensation is meant "to carry out an independent social policy and [is], therefore, not to be considered 'interim earnings' deductible from a discriminatee's back pay award." Inda v. United Air Lines, Inc., 405 F.Supp. 426, 435 (N.D. Cal. 1975); see also Tidwell v. American Oil Co., 332 F.Supp. 424 437-38 (D. Utah 1971). This is the rule followed by the NLRB in back pay cases, and approved by the Supreme Court in NLRB v.

Gullet Gin Co., 340 U.S. 361, 364 (1951). Ms. McGee's unemployment compensation ought not to be used to reduce back pay due her from KPR, for to do so would grant the employer a windfall not intended by the authors of Title VII. Furthermore, even if unemployment compensation could be offset against gross back pay, defendant in this case has failed to demonstrate the amount of such payments received.

By reaching this conclusion, I do not pass upon the possibility of the State of New York taking action to recover benefits paid to Ms. McGee as unemployment compensation. It may well be that the state has a valid claim for such monies.

(2) Amounts Earnable With Reasonable Diligence by Ms. McGee

The policy behind allowing defendants to reduce back pay by amounts earnable by plaintiffs in alternative employment is that the discharged employee should not be allowed to withdraw from the labor market and pass up suitable jobs while allowing damages to accumulate. The burden on the defendant is a heavy one. The employer must show that the discharged employee did not make reasonable efforts to gain other work, and that "substantially similar" jobs which the plaintiff could have discovered, and for which she was qualified, were available. Inda v. United Air Lines, Inc., 405 F.Supp. 426,

435 (N.D. Cal. 1975). The discriminatee need not seek out jobs which are outside her field of specialization, Id., nor need she look for work in other states or areas. See Hegler v. Board of Education of Bearden School District, 447 F.2d 1078, 1081 (8th Cir. 1971).

(a) Prior to September, 1975.

I find that after her discharge on May 15, 1973, but prior to September, 1975, Ms. McGee made the following unsuccesful attempts to obtain alternative employment:

She attended meetings of the Pharmaceutical Advertising Club, where she hoped to obtain information about job openings in the pharmaceutical advertising industry. (Tr. 181-82) She was interviewed for an account management position by Mr. Braunworth, personnel director of William Douglas McAdams, Inc., an advertising agency specializing in "ethical" drugs, in November, 1973, but was not hired. Her resume --submitted by an employment agency-- was reviewed by Mr. Braunworth a second time in May, 1975. Mr. Braunworth testified that her background --coming up from the ranks of secretaries rather than from a product management, marketing or sales position-- made her less qualified than other applicants, and she was not hired. (Tr. 152-54; 375-84; 395-98).

Ms. McGee also attempted to obtain employment as an account executive with Sudler & Hennessey; J. Walter Thompson; L. W. Frolich, and Ted Bates & Co., all advertising agencies involved to some extent in pharmaceutical advertising. (Tr. 154-56; 158-59; 170; 174-75). She also attempted to obtain employment with the trade magazines Science and Medicine (in 1973), Medical World News (in July, 1974), Contemporary Surgery and Medical Marketing and Media (in 1974). (Tr. 145-51; 163-64).

Furthermore, Ms. McGee attempted to obtain employment with the following audio-visual specialists whose work involved the pharmaceutical or health industries: World Health Information Services; Sidcom; Lavey, Wolf, Swift; Health Sciences International; and Medicus Communications. (Tr. 140-41; 152-53; 170-74). She also attempted to obtain employment as an account executive with Norman, Craig, Kummel, a consumer advertising agency whose work was outside of her area of experience and expertise. (Tr. 161-64).

Ms. McGee registered, and remains registered, with the following employment agencies: Women's Management; New York State Professional Placement Center; Fanning Personnel Agency; Mahoney Personnel Services; Benson Personnel Agency;

Archer Personnel Agency; and Front Desk Personnel. (Tr. 175-79). She applied for an editing position with Rockefeller University, and positions with the New York City Board of Higher Education and the Human Resources Administration. (Tr. 164-69).

Ms. McGee regularly followed the classified advertisements in the New York Times, especially in the Sunday editions. (Tr. 197-99).

I conclude that the defendant has failed to show that from May, 1973, to September, 1975, Ms. McGee was not reasonably diligent in her search for employment. The "normal steps in securing employment" --which defendant must show Ms. McGee did not take-- were enumerated by the Court of Appeals for the Seventh Circuit: checking want ads, registering with employment agencies and discussing employment opportunities with friends and acquaintances. Sprogis v. United Air Lines, Inc., 517 F.2d 387, 392 (7th Cir. 1975). Since the standard of "reasonable diligence" is not an absolute one, it is not necessary that the discriminatee contact every agency or prospective employer, or catch every want ad in every local newspaper. The steps Ms. McGee took from May, 1973, to September, 1975 --seeking out and contacting prospective employers,

reading classified advertisements in the Times, registering with employment agencies-- were reasonably calculated to make her need and desire for suitable employment known to the New York advertising agencies in her specialty and to local firms in related fields. Until she ceased searching for employment, Ms. McGee's efforts met the statutory standard.

(b) From September, 1975 to the Present.

By her own admission, Ms. McGee stopped looking for alternative employment in September, 1975. (Tr. 199).

Ms. McGee testified that she stopped looking for employment in September, 1975, because she asked the Court to reinstate her (Tr. 199); it was apparently her understanding (or misunderstanding) that, after prevailing at a trial on the merits and demanding reinstatement, she was no longer under an obligation to seek other work. In September, 1975, Judge Weinfeld reserved decision on the reinstatement issue, but referred the back pay and medical expenses questions to Magistrate Hartenstine for expeditious handling. Ms. McGee could have reasonably expected that, after KPR had been adjudged liable, a decision on remedies would soon be made. Unfortunately the Magistrate did not hold a hearing until February, 1976, and was unable to decide the back pay and medical expenses issues before his death, thus delaying the decision on rein-

statement. For some time after September, then, Ms. McGee's failure to look for other employment may be deemed to have been a reasonable one. At some point in the last eleven months it should have occurred to Ms. McGee that a decision on her request for reinstatement was not imminent, and for at least a part of the period in question, she failed to make the reasonably diligent effort required by Title VII.

However, the defendant has the burden of showing not only Ms. McGee's lack of reasonable diligence, but also that had such diligence been exercised, she might have obtained a job. As the Supreme Court noted in Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975), "[t]he backpay provision [of Title VII] was expressly modeled on the backpay provision of the National Labor Relations Act." (footnote omitted). Under the NLRA, the burden of showing the availability of alternative employment to diminish a back pay award is on the employer. McCann Steel Co., Inc., 203 N.L.R.B. 749 (1973), enforcement denied on other grounds, 489 F.2d 1328 (6th Cir. 1974); cf. NLRB v. Mastro Plastics Corp., 354 F.2d 170, 176 (2d Cir. 1965)("We agree with the Board's contention that the burden of going forward with evidence of job availability at the employer's plant would be placed upon the employer"). The defendant bears the same burden in a back pay case arising

under Title VII.

This does not mean that defendant must demonstrate that she would have gotten suitable employment, but merely that such employment was available in the area, that she could have discovered it had she made a reasonably diligent effort and that she was qualified for it. See Hegler v. Board of Education of Bearden School District, 447 F.2d 1078, 1081 (8th Cir. 1971). Defendant attempted to make these showings through the testimony of two witnesses --Ms. Mann, the head of the account management division of an employment agency specializing in placements in the advertising field and Mr. Braunworth, the personnel manager of William Douglas McAdams, Inc. Both testified that the job market in Ms. McGee's specialty had become quite poor by mid-1975. Furthermore, Mr. Braunworth had interviewed Ms. McGee in 1973 and reviewed her resume again in May, 1975 --when, in his opinion, business was better than in late 1975-- and twice did not choose her for available jobs on the ground that she was not sufficiently qualified. Thus, the defendant has failed to show that had Ms. McGee made a reasonably diligent search for appropriate employment after September, 1975, she would have discovered suitable opportunities for which she was qualified. Although it may appear unjust that a discharged employee may

recover back pay for a period of time in which, by her own admission, she did not make a reasonable search for employment, it is clear that the law requires the defendant to go forward with evidence of the availability of suitable work. Defendant has not carried that burden, and has thus not demonstrated the existence of "amounts earnable with reasonable diligence" by Ms. McGee after September, 1975.

In conclusion, Ms. McGee's back pay award should be reduced by $1,400 --leaving $67,011.32 exclusive of interest.

II. PENSION AND PROFIT-SHARING PLANS

All parties agree that KPR has remitted all monies due Ms. McGee under its pension and profit-sharing plans.

III. MEDICAL EXPENSES AND MEDICAL INSURANCE PREMIUMS

All parties agree that of Ms. McGee's medical expenses between May 15, 1973 and February, 1976, $1,837.92 would have been recovered under KPR's major medical policy had she not been discharged. Furthermore, all parties agree that Ms. McGee spent $613.14 between May 15, 1973, and February, 1976, to obtain Blue Cross/Blue Shield coverage to replace the protection which she lost when discharged by KPR. Therefore,

she should receive $2,451.06 plus interest for these expenses.

IV. INTEREST

Defendant must pay Ms. McGee 6% interest on the net back pay, medical expenses and Medical Insurance premiums, compounded quarterly.*

V. CONCLUSION

Ms. McGee should be awarded $69,462.38 plus 6% interest, compounded quarterly.

The foregoing constitutes the Magistrate's Findings of Fact and Conclusions of Law.

Respectfully submitted,

SOL SCHREIBER
UNITED STATES MAGISTRATE

Dated: New York, New York
August 31, 1976

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* Six percent is the standard rate of interest in Title VII cases. See, e.g., Frobig v. Held Warehouse & Transp. Corp., 8 FEP Cases 926, 931 (E.D.N.Y. 1974); Laffey v. Northwest Air-Lines, Inc., 374 F.Supp. 1382, 1389 (D.D.C. 1974).
Interest should be compounded quarterly from the date it accrues, as in NLRB back pay cases. See F. W. Woolworth Co., 90 N.L.R.B. 289 (1950); NLRB v. Seven-Up Bottling Co. of Miami, 344 U.S. 344 (1953).

APPENDIX: CALCULATIONS

A. Gross Back Pay

The salaries of the three account management employees who were with KPR throughout the years 1973-75 are:

Employee	Position	1973 Salary	1974 Salary	1975 Salary
Harriet Frieze	Account Executive	25,369.30	28,500.00	35,166.66
Robert Mayer	Account Executive	24,161.54	25,966.74	29,874.98
Milton Loeb	Senior Account Executive	30,866.66	33,399.92	39,416.60
	Total	80,397.50	87,666.66	104,458.24
	Average	26,799.16	29,288.89	34,819.41

(No data is available for 1972 or 1976.)

The differences in average yearly salaries are:

1973 to 1974: $2,489.73, or an increase of 9.3% of 1973 salary.
1974 to 1975: $5,530.52, or an increase of 18.9% of 1974 salary.

Applying these percentages to Ms. McGee's salary, and assuming (because we have no 1972 or 1976 data) that her 1973 salary would have been equal to her 1972 salary and that her 1976 salary would have been identical to her 1975 salary -- both rather conservative assumptions-- the calculations are as follows:

Period	Annual Rate of Salary	Salary for relevant period
May 15, 1973 to December 31, 1973 (6 1/2 months)	$18,000	9,750.00
January 1 - December 31, 1974	19,674*	19,674.00
January 1 - December 31, 1975	23,392.39**	23,392.39
January 1 - August 31, 1976 (8 months)	23,392.39	15,594.93
	Total:	68,411.32

B. Net Back Pay

Gross back pay ($68,411.32) less interim earnings ($1,400) is $67,011.32.

C. Total Award

Net back pay ($67,011.32) plus reimbursement for medical outlays and Blue Cross/Blue Shield premiums ($2,451.06) is $69,462.38, to which sum should be added 6% interest, compounded quarterly.

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* - $18,000 + 9.3% of $18,000.
** - $19,674 + 18.9% of $19,674.

Opinion of Judge Weinfeld on Damages

A-233

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

JOSEPHINE McGEE,

Plaintiff-Intervenor,

against

KALLIR, PHILIPS, ROSS, INCORPORATED,

Defendant.

74 Civil 3234

75 Civil 401

OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW

#45225

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EDWARD WEINFELD, D. J.

This Court, after a trial upon the merits, rendered a decision on July 31, 1975 finding that defendant violated section 704 of the Civil Rights Act of 1964,[1] in that its discharge of plaintiff was in retaliation for her filing a charge of discrimination against defendant, and that plaintiff was entitled to an appropriate judgment.[2] The attorneys for the respective parties were unable to agree on the form of the judgment. Thereupon, on September 30, 1975, this Court ordered a forthwith hearing before the late Magistrate Hartenstine[3] to compute the amount of back pay to which plaintiff was entitled, reduced by the amount that she reasonably could have earned since her discharge. At that time the Court observed that it defied understanding why the lawyers "have not been able to sit down and compute these figures yourselves."[4]

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(1) 42 U.S.C. § 2000e-3(a) (as amended). Subsequent citations will be to the United States Code.

(2) EEOC v. Kallir, Philips, Ross, Inc., 401 F. Supp. 66 (S.D.N.Y. 1975). Although the suit was brought by the EEOC, see 42 U.S.C. § 2000e-5(f)(1), in this opinion "plaintiff" will refer to plaintiff-intervenor Josephine McGee. Familiarity is assumed with the facts set forth in the Court's prior opinion.

(3) See 28 U.S.C. § 636(b); Rule 35(a), S.D.N.Y. General Rules.

(4) Transcript of Hearing, Sept. 30, 1975, at 2.

Unfortunately the Court's purpose to obtain an expeditious disposition has not been realized. The post-trial proceedings have been marked by unusual delay, much of it due to obstructive and dilatory conduct by defense counsel and unseemly conduct engaged in by both plaintiff and defense counsel at the hearings before the Magistrate.(5) The testimony on the issues referred to the Magistrate extended over a three-day period, on February 17, 25 and 26, 1976; the transcript exceeds that of the trial record. Much of this is accounted for by petty bickering between counsel and evidential objections that at times bordered on the captious. Further delay was occasioned by submission of proposed findings to the Magistrate.

Magistrate Hartenstine died in July 1976 while the matter was sub judice before him. In an attempt to conclude the matter, this Court, on July 30, 1976, referred the proceedings to Magistrate Schreiber to review the record and to report, which he did on August 31, 1976. The parties were invited to express their views upon the Magistrate's recommendations, and following receipt of their comments and

(5) See, e.g., Transcript of Magistrate's Hearing, at 201-04, 215, 338-39, 431-32, 471, 477.

objections, the Court heard the parties in support of their respective positions. The defendant, in opposing the recommendations, requests that since Magistrate Schreiber did not hear or observe the witnesses, the matter again be referred to a Magistrate for a de novo hearing and report on the very issues that were the subject of the reference to Magistrate Hartenstine.

It is now more than fourteen months since this Court rendered its decision that defendant's discharge was retaliatory and unlawful. Plaintiff was discharged on May 15, 1973, more than three years ago. Another reference will serve no purpose except to gain more time for defendant and to delay the judgment day. The original reference was made by this Court out of an abundance of fairness to defendant, since it was evident that upon the trial defendant had failed to counter plaintiff's testimony that despite her best efforts following her discharge all she earned was no more than $1400. There was enough before the Court to have permitted a finding at that time on the award of damages. The reference afforded the defendant a second opportunity to present proof on the issue. There is no need for another reference or additional testimony. The defendant had a full opportunity at the post-

trial hearing to examine and cross-examine witnesses and to offer all its proof to negate plaintiff's claim for damages; the record shows it did so. It is time to call a halt to the dilatory tactics of defendant and to award plaintiff the judgment to which she is entitled under the Court's decision.

In passing upon a Magistrate's report the Court is required to review the entire record and come to its own determination on the merits of the matter, to avoid an abdication of judicial responsibility.(6) The Court has read and studied this record word for word. In addition, the Court had the benefit of demeanor testimony on this as well as other issues during the original trial of this matter. The Court will therefore determine the outstanding issues upon the trial re and the record before Magistrate Hartenstine, and makes the following additional findings of fact and conclusions of law.

(6) See Campbell v. United States District Court, 501 F.2d 196, 205-07 (9th Cir.), cert. denied, 419 U.S. 879 (1974); cf. Mathews v. Weber, 423 U.S. 261, 269-75 (1976). Compare Rule 53(b),(e)(2), Fed. R. Civ. P.

GROSS AMOUNT OF BACK PAY

Plaintiff is entitled to be made whole for the losses she sustained as a result of her wrongful discharge.[7] This includes back pay from the date of discharge to the present, including such increases, if any, as she would have received within that period.[8] The defendant contends that salary increases were granted by its Executive Committee on an individual basis, depending in each instance upon an evaluation of the employee's performance, and that plaintiff's performance had so deteriorated that she would not have been granted any increase. Accordingly, defendant argues that it would be highly speculative to award any salary increase to plaintiff. The short answer is that where one's conduct has

(7) Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975); EEOC v. Steamfitters Local 638, Dkt. Nos. 75-6132, -6140, -7646, -7668, -7699, -7011 (2d Cir. Sept. 7, 1976), slip op. at 5447.

(8) Satty v. Nashville Gas Co., 522 F.2d 850, 855 (6th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3254 (U.S. Oct. 7, 1975) (No. 75-536); see also Golay & Co. v. NLRB, 447 F.2d 290, 294-95 (7th Cir. 1971), cert. denied, 404 U.S. 1058 (1972). The Supreme Court has stated that the back pay provision of Title VII was "expressly modeled on the backpay provision of the National Labor Relations Act" and has looked to cases arising under that act to interpret the scope of back pay in Title VII cases. Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 & n.11 (1975).

prevented a precise computation of damages, the injured party is not to be deprived of adequate damages. The trier of the fact may draw reasonable inferences from relevant facts, and all doubts are to be resolved in favor of the injured party; the wrongdoer does not become the beneficiary of his own wrongful conduct.(9) First, this Court has already rejected defendant's contention that McGee's job performance was the cause of her discharge; second, it is a fact that plaintiff received periodic increases; third, plaintiff's co-workers, engaged in similar activities, have received increases within the period here under consideration.

Plaintiff's job performance with defendant during her entire service earned her repeated advances in position and salary. She started in 1967 as an administrative assistant to an account executive at a salary of $8,000 per year. The next year she was promoted to account executive at $9,000

(9) Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-65 (1946); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562-63 (1931); EEOC v. Steamfitters Local 638, supra n. 7, slip op. at 5439-40; Day v. Mathews, 530 F.2d 1083, 1086 (D.C. Cir. 1976); Kaplan v. Theatrical Employees Local 659, 525 F.2d 1354, 1362-63 (9th Cir. 1975); Hairston v. McLean Trucking Co., 520 F.2d 226, 232-33 (4th Cir. 1975); Meadows v. Ford Motor Co., 510 F.2d 939, 941-48 (6th Cir. 1975); Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364, 1379-80 (5th Cir. 1974).

a year; thereafter she received yearly raises to $10,000, $12,500, and $15,000, and finally to $18,000, when she was notified of her discharge on May 15, 1973. She was promoted to account administrator, account executive and senior account executive. While her rise was meteoric, it would be unrealistic to assume she would have continued to receive the large annual raises she received up to the time of her discharge; so, too, it would be unrealistic to assume that she would not have received some increase. The grant of an increase in wages or salary is a normal incident of the way of life in the industrial and commercial world. The evidence warrants a finding that except for defendant's unlawful discharge of plaintiff, she would have, in the normal course of her continued employment with the defendant, received periodic salary increases.

In an effort to reach a fair evaluation of such likely increases, the Court has reviewed the payroll records of defendant's employees within the job category of "account executive" during the years 1973, 1974 and 1975. Each such employee was granted an increase in annual salary in each of those years. While the amount of the individual increases varied, all fell within a range of from seven to twenty per cent. However, plaintiff's basic salary varied substantially

from those of some account executives, so that no precise yardstick for comparison purposes may be applied. In view of plaintiff's rapid rise, as the dollar amount of her salary increased, it is probable that the percentage rate of increase would level off. Thus for the first year after discharge the Court deems an increase of ten per cent appropriate; thereafter, seven and a half per cent. Accordingly, the Court computes the gross amount of back pay to which plaintiff is entitled as follows:

Salary from May 1 to December 1, 1973, at $18,000 per year[10]	$12,000.00
Salary for 1974	19,800.00
Salary for 1975	21,285.00
Salary from January 1 to September 30, 1976, at $22,681.38 per year	17,161.04
Total back salary	$70,246.04

In addition to salary, the plaintiff is entitled to receive as part of her back pay award any fringe benefits she would have received had she remained employed by defendant.[11] Defendant has already paid to plaintiff her interest

(10) The parties stipulated that plaintiff was last paid on April 30, 1973.

(11) Satty v. Nashville Gas Co., 522 F.2d 850, 855 (6th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3254 (U.S.

in defendant's profit-sharing and pension plans as of the time of her discharge. Further, plaintiff spent $613.14 after her discharge to replace Blue Cross/Blue Shield coverage which defendant had formerly provided, and incurred medical expenses (not covered by her health insurance) of which $1,837.92 would have been reimbursable under defendant's major medical policy. Plaintiff is thus entitled to a total of $2,451.06 in addition to her salary, making a total gross back pay award of $72,697.10.

DEDUCTIONS FROM BACK PAY

Once the gross amount of back pay owed plaintiff has been determined, the burden shifts to the defendant to prove what should be deducted therefrom as "[i]nterim earnings or amounts earnable with reasonable diligence."(12) The

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footnote 11 cont'd

Oct. 7, 1975) (No. 75-536); Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 263 (5th Cir. 1974); Bowe v. Colgate, Palmolive Co., 489 F.2d 896, 903 (7th Cir. 1973).

(12) 42 U.S.C. § 2000e-5(g); see Kaplan v. Theatrical Employees Local 659, 525 F.2d 1354, 1363 (9th Cir. 1975); Sprogis v. United Air Lines, Inc., 517 F.2d 387, 392 (7th Cir. 1975); Inda v. United Air Lines, Inc., 405 F. Supp. 426, 434 (N.D. Cal. 1975). This is the rule in cases under the National Labor Relations Act, see n. 8 supra. NLRB v. Nickey Chevrolet Sales, Inc., 493 F.2d 103, 107-08 (7th Cir.).

parties stipulated that plaintiff earned $1,400 as a typist in 1974 and 1975. The sum of $5,385 received by plaintiff as unemployment compensation since her discharge should further be deducted from the amount owed her,(13) which, together with the aforementioned interim earnings, requires a total deduction of $6,785, leaving a net sum of $65,912.10.

Defendant claims that it has shown that a further deduction should be made from plaintiff's back pay award for amounts earnable with reasonable diligence. Its position is that the failure of plaintiff to use all available means of pursuing employment opportunities establishes lack of due diligence in seeking employment. However, defendant's burden of proving a lack of diligence is not satisfied merely by a showing that there were further actions that plaintiff could have taken in pursuit of employment. Rather, defendant must

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footnote 12 cont'd

cert. denied, 419 U.S. 834 (1974); NLRB v. Madison Courier, Inc., 472 F.2d 1307, 1318 (D.C. Cir. 1972); NLRB v. Miami Coca-Cola Bottling Co., 360 F.2d 569, 575 (5th Cir. 1966); NLRB v. Mastro Plastics Corp., 354 F.2d 170, 178-79 (2d Cir. 1965); NLRB v. Brown & Root, Inc., 311 F.2d 447, 454 (8th Cir. 1963).

(13) EEOC v. Steamfitters Local 638, supra n. 7, slip op. at 5448-50; Satty v. Nashville Gas Co., 522 F.2d 850, 855 (6th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3254 (U.S. Oct. 7, 1975) (No. 75-536); Bowe v. Colgate-Palmolive Co., 416 F.2d 711, 721 (7th Cir. 1969).

show that the course of conduct plaintiff actually followed was so deficient as to constitute an unreasonable failure to seek employment. The range of reasonable conduct is broad and the injured plaintiff must be given the benefit of every doubt in assessing her conduct.(14)

Plaintiff's skills come within the fairly limited or specialized field of pharmaceutical advertising. Her

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(14) See Williams v. Albemarle City Board of Educ., 508 F.2d 1242, 1243 (4th Cir. 1974) (en banc); Inda v. United Air Lines, Inc., 405 F.Supp. 426, 435 (N.D. Cal. 1975); Lowry v. Whitaker Cable Corp., 348 F. Supp. 202, 218 (W.D. Mo. 1972), aff'd, 472 F.2d 1210 (8th Cir. 1973). Cf. Ellerman Lines, Ltd. v. The President Harding, 288 F.2d 288, 290 (2d Cir. 1961):

> It is not fatal to recovery that one course of action, reasonably open but not followed, would have avoided further injury whereas another, also reasonable and taken, produced it. . . . The standard of what reason requires of the injured party is lower than in other branches of the law. . . . [Plaintiff] ought not be deprived of recovery if its conduct came within the range of reason, even if the full light of reason was not, in fact, brought to bear.

The conduct which will bar recovery of back pay under the National Labor Relations Act, see n. 8 supra, has been characterized as "a clearly unjustifiable refusal to take desirable new employment" or "a willful loss of earnings." Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 199-200 (1941); NLRB v. Mastro Plastics Corp., 354 F.2d 170, 174 n.3 (2d Cir. 1965). See also Heinrich Motors, Inc. v. NLRB, 403 F.2d 145, 148-49 (2d Cir. 1968); NLRB v. Arduini Mfg. Corp., 394 F.2d 420, 423 (1st Cir. 1968); NLRB v. Cashman Auto Co., 223 F.2d 832, 836 (1st Cir. 1955).

only training was in this field. Prior to September 1975, plaintiff sought work both within her area of competence and without it. In that period she contacted, or attempted to contact, seven advertising agencies, ten firms in related areas (such as trade publications or companies which organized audio-visual medical seminars), and eight employment agencies. She also applied for work with two government agencies. She did not apply to every advertising agency in her field, nor did she make extensive use of classified advertisements or employment agencies which specialize in placing advertising executives. Instead, she relied upon her personal contacts within advertising agencies and upon informal means such as personal references and attendance at trade association meetings, in an effort to find job openings for which she might be suited. As previously noted, her efforts were unsuccessful except that she was referred to some part-time secretarial work by one of the employment agencies.

The evidence in the case does not support defendant's contention that plaintiff failed to use reasonable means of seeking employment. Defendant has not shown that plaintiff was not active in her efforts; rather, it is clear that plaintiff attempted to obtain alternate employment. The specialized

nature of pharmaceutical advertising and promotion necessarily limited the available opportunities, and word of mouth contact was an effective means of seeking job opportunities. The testimony of defendant's own expert witness, the personnel director of the largest pharmaceutical advertising agency,(15) lends substantial support to plaintiff's contention that her actions were reasonably diligent. He testified that his usual practice in finding qualified persons for vacancies at his firm is to examine his personal file of contacts made over the years and to inquire about potentially available executives from his own employees and from persons he knows in other agencies. Thus he relies primarily on the very means used by plaintiff in her efforts to seek employment -- word of mouth and personal contacts. Plaintiff's use of the same method as that employed by an experienced personnel director was not unreasonable. Upon careful examination of the entire record, the Court finds that the defendant has failed to sustain its burden of showing that the plaintiff did not diligently seek employment in the period following her discharge and prior to September 1975.

(15) Plaintiff applied to this firm for employment but her application was rejected in favor of another applicant whom the witness felt was better qualified for the position.

However, plaintiff made no effort to secure employment after September 1975 because she expected to be reinstated immediately following this Court's earlier opinion.[16] Defendant claims that plaintiff is entitled to no back pay after that time. However, Title VII requires that a back pay award be reduced only by "amounts earnable with reasonable diligence." To sustain its burden of establishing such deductions, the defendant must show not only that plaintiff failed to exercise due diligence in seeking employment, but also that had she been diligent she might have found employment and had some earnings.[17] By the testimony of defendant's own witnesses, however, the job market for advertising executives "stunk terrible" in 1975. Defendant has not shown that any jobs were available to plaintiff at the time she stopped looking for work, and has thus failed to sustain its

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(16) Although defendant claims plaintiff stopped looking for work in December 1974, she made at least two further efforts through employment agencies. Moreover, the job market for advertising executives was generally bad throughout most of 1975, and so defendant has not shown that any jobs were available for plaintiff at any time during the year.

(17) See Sparks v. Griffin, 460 F.2d 433, 443 (5th Cir. 1972); Hegler v. Board of Educ., 447 F.2d 1078, 1081 (8th Cir. 1971); cf. Inda v. United Air Lines, Inc., 405 F. Supp. 426, 435 (N.D. Cal. 1975).

burden of showing any "amounts earnable with reasonable diligence" after plaintiff was discharged. Plaintiff is thus entitled to a net back pay award of $65,912.10.

REINSTATEMENT

Reinstatement is a troubling aspect of this case, already beset by a number of difficult problems. Like the other remedies available under Title VII, reinstatement is not mandatory upon a finding that an employee has been discriminatorily discharged, but is an equitable remedy whose appropriateness depends upon the discretion of the court in the light of the facts of each individual case.(18) However, since the purpose of reinstatement is to make the plaintiff whole for the injury she has suffered, it, like back pay, should be denied

(18) 42 U.S.C. § 2000e-5(g) ("the court may . . . order such affirmative action as may be appropriate") (emphasis supplied); Taylor v. Safeway Stores, Inc., 524 F.2d 263, 268 (10th Cir. 1975); Brito v. Zia Co., 478 F.2d 1200, 1204 (10th Cir. 1973); see Albemarle Paper Co. v. Moody, 422 U.S. 405, 415-16 (1975). See also NLRB v. Commonwealth Foods, Inc. (West End), 506 F.2d 1065 (4th Cir. 1974); NLRB v. King Louie Bowling Corp., 472 F.2d 1192 (8th Cir. 1973); see n. 8 supra.

> only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.(19)

This litigation has been marked by more than the usual hostility between the parties. Some antagonism is the natural result of the filing and litigation of discrimination and retaliation charges and to deny reinstatement merely because of the existence of hostility might be contrary to the remedial goals of Title VII.(20) However, in this case the job from which plaintiff was discharged required a close working relationship between plaintiff and top executives of defendant. It also involved frequent personal contact with defendant's clients, with plaintiff acting as defendant's representative. Lack of complete trust and confidence between plaintiff and defendant could lead to misunderstandings, misrepresentations and mistakes, and could seriously damage defendant's relationship with its clients. The situation here

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(19) Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975); see also Franks v. Bowman Transp. Co., 96 S. Ct. 1251, 1267 (1976).

(20) Cf. Burton v. Cascade School Dist., 512 F.2d 850, 855-56 (9th Cir.), cert. denied, 423 U.S. 839 (1975) (Lumbard, J., dissenting).

is quite unlike that presented when reinstatement is sought for an assembly line or clerical worker, or even for an executive whose job is not as sensitive for his employer's interests as is plaintiff's job here. The Court is convinced that after three and a half years of bitter litigation the necessary trust and confidence can never exist between plaintiff and defendant. To order reinstatement on the facts of this case would merely be to sow the seeds of future litigation, and would unduly burden the defendant. Thus, reinstatement will not be ordered in this case.(21) However, it would be unjust to plaintiff to deny her reinstatement without giving her a reasonable opportunity to find other employment. The Court is of the view that in the current market and economic climate in the pharmaceutical advertising industry, by the exercise of diligent effort plaintiff should be able to secure employment at a salary commensurate with her skills within a year. Thus the Court will award an additional one year's salary of $22,881.38.

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(21) See Hyland v. Kenner Prod. Co., 11 CCH Empl. Prac. Dec. ¶ 10,926 at 7912-13 (S.D. Ohio May 5, 1976); cf. Burton v. Cascade School Dist., 512 F.2d 850, 852-54 (9th Cir.), cert. denied, 423 U.S. 839 (1975); Held v. Missouri Pacific R.R., 373 F. Supp. 996, 1004 (S.D. Tex. 1974).

CONCLUSION

The plaintiff is entitled to judgment in the amount of $88,793.48, plus six per cent interest payable quarterly.

Judgment may be entered accordingly.

Dated: New York, N. Y.
October 8, 1976

United States District Judge

Motion of Counsel of Plaintiff-Intervenor for Leave to Withdraw

A-253

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

- and -

JOSEPHINE McGEE,

Plaintiff-Intervenor,

- against -

KALLIR, PHILIPS, ROSS, INCORPORATED, a New York Corporation,

Defendant.

NOTICE OF MOTION

74 Civil 3234 (S.D.)
75 Civil 401 (S.D.)

SIRS:

PLEASE TAKE NOTICE, that upon the annexed affidavit of THOMAS A. HOLMAN, ESQ., duly sworn to the 23rd day of January, 1976, and upon all of the pleadings and proceedings heretofore had herein and upon the annexed exhibits, the undersigned will move this Court in Room 706, at the Courthouse located at Foley Square, New York, New York, on the 3rd day of February, 1976, or as soon thereafter as counsel may be heard for an Order granting leave to the law firm of O'DWYER & BERNSTEIN, ESQS., to withdraw as attorneys for plaintiff-intervenor in the above entitled action, and for such other and further relief

as to this Court may seem just and proper.

Dated: New York, New York
January 27, 1976

Yours, etc.

O'DWYER & BERNSTIEN
63 Wall Street
New York, NY 10005
269-3939

To:

Davis & Gilbert
500 Fifth Avenue
New York, New York 10036

Paul Contarek, Esq.
Philadelphia Regional Litigation Center
127 North 4th Street
Philadelphia, Pa. 19104

Ms. Josephine Mc Gee
309 East 87th Street
New York, New York 10028

Ronald Copeland, Esq.
EEOC
26 Federal Plaza
New York, New York 10007

Charles J. Hartenstine
U.S. Magistrate
U.S. Courthouse, Room 1603
Foley Square
New York, New York 10007

Judge Edward Weinfeld
U.S. Courthouse, Room 2204
Foley Sq.
New York, New York 10007

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

- and -

JOSEPHINE McGEE,

Plaintiff-Intervenor,

- against -

KALLIR, PHILIPS, ROSS, INCORPORATED, a New York Corporation,

Defendant.

AFFIDAVIT

74 Civil 323⅓ (S.N.)
75 Civil 401 (S.N.)

THOMAS H. HOLMAN, being duly sworn deposes and says:

I am an attorney associated with O'DWYER & BERNSTIEN, attorneys for the plaintiff-intervenor in the above-entitled action. As one of the trial attorneys in this case, I am fully familiar with the facts and circumstances of the above-entitled action. I submit this affidavit in support of a motion seeking leave of this Court to be relieved as counsel for the plaintiff-intervenor in the above-entitled action.

This is an action which was commenced by the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION against KALLIR, PHILIPS, ROSS, INC., an advertising agency, charging that it suspended and later discharged JOSEPHINE McGEE in retaliation for her filing a charge of sex discrimination against KPR and for her opposition to KPR's

alleged unlawful employment practices in violation of Section 704 (a) of Title VII of the Civil Rights Act of 1964, as amended. JOSEPHINE McGEE (plaintiff-intervenor) was granted leave to intervene by this Court.

The trial of this action was held on June 5, 1975, and the opinion, findings of fact, and conclusions of law of this Court was filed on July 31, 1975.

On September 30, 1975, a motion was brought before this Court to settle the final order and judgment in accordance with Your Honor's opinion. Your Honor directed that certain matters be referred to a magistrate in connection with the payment of back pay and medical expenses to the plaintiff-intervenor. Counsel for all parties promptly reported to Magistrate Hartenstine, in accordance with Your Honor's instructions. Magistrate Hartenstine set the matter down for a hearing on December 2, 1975. Certain requests were made by the defendant and by the plaintiff-intervenor for discovery in connection with their respective preparation for the magistrate's hearing. These requests for discovery made necessary the adjournment of the magistrate's hearing to January 6, 1976. This first adjournment was requested by the defendant. Another adjournment was requested by counsel for the plaintiff-intervenor to January 13, 1976, and then the defendant requested a further adjournment to January 19, 1976 on the ground that counsel was not prepared to proceed. Counsel for

the plaintiff-intervenor resisted the adjournment. The hearing was adjourned again to February 17, 1976, to permit counsel the opportunity to make this instant application to the Court.

The delays in this post-trial aspect of the case have been a vexing concern to the plaintiff-intervenor who feels that she has waited too long for the relief that she has fought hard to win. Counsel has attempted on numerous occasions to explain the reasons for the delays, but these explanations have been apparently insufficient or unsatisfactory from the plaintiff-intervenor's point of view.

On January 15, 1976, the plaintiff-intervenor was requested to meet with her attorneys sometime during the next day in order to prepare for the magistrate's hearing scheduled for January 19, 1976. Plaintiff-intervenor refused to agree to a meeting with her attorneys. Notwithstanding the fact that one of her attorneys would be away from this jurisdiction and that her other attorney was involved in a jury trial in the Supreme Court of Queens County, she insisted that her hearing not be adjourned to the magistrate's next available date, which would have been February 2, 1976. Therefore, preparation for plaintiff-intervenor's testimony and presentation to the magistrate would, by necessity, then have had to be the very next day.

Plaintiff-intervenor refused to meet with her attorneys and told her attorneys that she would be present at the magistrate's

hearing on Monday, January 19, at 2:00 p.m. and was not concerned that her attorneys be there with her. Further, she advised her attorneys that she had nothing further to tell them in connection with the magistrate's hearing scheduled for January 19, 1976.

Without cooperation from the plaintiff-intervenor, counsel cannot adequately represent her interests, and that lack of cooperation coming at a time when plaintiff-intervenor protests further delay make it impossible for your deponent's firm to properly proceed with this stage of the proceeding.

Further, plaintiff-intervenor has repeatedly communicated directly to this Court and to the magistrate. She has been repeatedly cautioned by deponent that this law firm could not continue to represent her if these communications continued, yet she continued to sent letter upon letter to this Court.

It is in view of the foregoing that your deponent sent plaintiff-intervenor a letter dated January 15, 1976, which advised plaintiff-intervenor that this application would be made.

WHEREFORE, your deponent respectfully requests that an Order be made and entered relieving your deponent's firm as attorneys in the above entitled matter, and for such other and further as to this Court may seem just and proper.

Thomas A. Holman

THOMAS A. HOLMAN

Sworn to before me this

16 day of January, 1976.

I, BRIAN O'DWYER, one of the attorneys for the Plaintiff-Intervenor hereby certify that I mailed the within Motion, Affidavit and Exhibits to:

Davis & Gilbert
500 Fifth Avenue
New York, New York 10036

Paul Cotarek, Esq.
Philadelphia Regional Litigation Center
127 North 4th Street
Philadelphia, Pa. 19104

Ms. Josephine Mc Gee
309 East 87th Street
New York, New York 10028

Ronald Copeland, Esq.
EEOC
26 Federal Plaza
New York, New York 10007

Charles J. Hartenstine
U.S. Magistrate
U.S. Courthouse, Room 1603
Foley Square
New York, New York 10007

Judge Edward Weinfeld
U.S. Courthouse, Room 2204
Foley Sq.
New York, New York 10007

Dated: New York, New York
January 27, 1976.

BRIAN O'DWYER
O'Dwyer & Bernstein
63 Wall Street
New York, New York 10005
(212) 269-3939

A-260

October 31, 1975

Josephine McGee
309 East 87 Street
New York, New York

Dear Josie:

Enclosed please find two checks made payable to you in the amounts respectively of $1,767.96 and $1,442.69. I hope you can will use the money and don't spend it all in one place. I also enclose a copy of a letter from Mr. Patterson indicating that you can accept these checks without any prejudice to your rights.

We will keep you posted as to further developments with respect to the magistrate's hearing.

Yours very sincerely,

Thomas A. Nolan

TAN:jc
Encs.

A-261

1-794
750

THE NEW YORK BANK FOR SAVINGS

CHECK NO. A381802

TELLERS ACCOUNT

16-159/270

NEW YORK, N.Y. DATE 10 21 75 PAY $ 1,717.25

TO THE ORDER OF Josephine A. Inglese

THE NEW YORK BANK FOR SAVINGS 7

TO

SAVINGS BANKS TRUST COMPANY
NEW YORK, N.Y.

John B. Lee
AUTHORIZED SIGNATURE

⑈0138180 2⑈ ⑆0250⑆0794⑆ 0024 2⑈0079⑈

TELLERS CHECK

No. 070877

The Bowery Savings Bank

110 East 42nd Street, New York, New York 10017

1-97
210

NEW YORK, N.Y. 10-24-75

PAY TO THE ORDER OF Josephine A. Inglese and Others

7 IRVING TRUST COMPANY, 42ND STREET AT PARK AVENUE, N.Y.

James Cullen Jr.
TELLER

⑈0708 77⑈ ⑆0250⑆0067⑆ 07 300 090⑈

A-262

January 15, 1976

Josephine McGee
300 East 87th Street
New York, N. Y. 10028

Dear Josie:

This letter shall confirm your telephone conversations of today with the undersigned, when we discussed the Magistrate's hearing scheduled for Monday, January 19, 1976 at 2:00 P.M. before Magistrate Hartenstine.

I first requested that you consider a postponement of your hearing to February 2, 1976 in view of Brian O'Dwyer being away from New York on Monday, and further for the reason that I have a trial commitment on said day in the Supreme Court, Queens County. However, you refused to agree to this postponement.

As to the hearing scheduled for Monday, you were requested by me to meet with me tomorrow in order to prepare for the hearing on Monday. You refused to come to the office, even after being advised by me that I could not render you effective assistance at your hearing if you did not do so.

In view of the foregoing circumstances, together with what has become a rather deteriorating situation between you and this Law Firm, you should be advised that this Law Firm shall make application to Judge Weinfeld to be relieved as attorneys in your case.

Yours very truly,

O'DWYER & BERNSTEIN

By: Louis A. Nolan

WAL:lbe

A-263

309 East 87 Street
New York, N. Y. 10028
January 17, 1975

Thomas Holman, Esq.
O'Dwyer & Bernstien
63 Wall Street
New York, N. Y. 10005

Dear Tom:

I was not surprised to receive your letter informing me the firm of O'Dwyer & Bernstien will ask to be relieved as attorneys in my case. I was also not surprised to find errors in your letter.

It was Brian, not you, who discussed the possibility of postponing the hearing a week, until the 26th or 27th, when he would be available. The necessity of a postponement was emphasized when you said you had a jury trial which would continue until the 19th. I did say I would consider a postponement since neither of you would be available on the 19th. Unfortunately the only time Magistrate Hartenstine had available was February 2nd, and considering the conditions under which I am forced to live, that was too far in the future for me to accept.

To my amazement, you called to ask me to come down to be "prepared" for the hearing on the 19th, which you were now able to attend. I have never been told this preparation was necessary before any of the previous hearing dates, and suddenly it was possible for you to attend on the 19th. Your credibility suffered a severe blow with that revelation because it proved my case and interests are considered expendable.

This confusion only confirmed the lack of communication with the client, but also within the firm. The postponement granted Thursday, Jan. 16th, from January 13th to 19th -- according to Magistrate Hartenstine, "... on consent of the attorneys for the intervenor...." Brian said he knew nothing of it and could not have agreed since he will be in Puerto Rico the entire week of January 19th on business. In your letter of January 12th you also state that you did not consent to the postponement. This presented me with not three versions of a story, but three completely different statements. I opted for Magistrate Hartenstine's statement.

Such deliberate lack of communication with a client is unfortunate, but lack of communication within a firm -- as between you and Brian -- is not only unprofessional and self-defeating, but can become publicly embarrassing.

Sincerely,

Josephine McGee

cc: Hon. E. Weinfeld

Of O'Dwyer & Bernstein:
Frank Durkan, Esq.
Brian O'Dwyer, Esq.

A-264

O'DWYER & BERNSTIEN

OSCAR BERNSTIEN
(1919-1974)

FRANK DURKAN
LEON HERSHBAUM
JOHN BYRNE
HUGH J. O'ROURKE
LAURA PITCHAL
BRIAN O'DWYER
THOMAS A. HOLMAN

63 WALL STREET
NEW YORK, N. Y. 10005
TELEPHONE BOWLING GREEN 9-3939

January 15, 1976

Josephine McGee
369 East 67th Street
New York, N. Y. 10023

Dear Josie:

This letter shall confirm your telephone conversations of today with the undersigned, when we discussed the Magistrate's hearing scheduled for Monday, January 19, 1976 at 2:00 P.M. before Magistrate Hartenstine.

I first requested that you consider a postponement of your hearing to February 2, 1976 in view of Brian O'Dwyer being away from New York on Monday, and further for the reason that I have a trial commitment on said day in the Supreme Court, Queens County. However, you refused to agree to this postponement.

As to the hearing scheduled for Monday, you were requested by me to meet with me tomorrow in order to prepare for the hearing on Monday. You refused to come to the office, even after being advised by me that I could not render you effective assistance at your hearing if you did not do so.

In view of the foregoing circumstances, together with what has become a rather deteriorating situation between you and this Law Firm, you should be advised that this Law Firm shall make application to Judge Leibfeld to be relieved as attorneys in your case.

Yours very truly,

O'DWYER & BERNSTIEN

By: Thomas A. Holman

TAH:lbe

A-265

309 East 87 Street
New York, N. Y. 10028
January 12, 1976

Hon. Edward Weinfeld
U. S. Federal Court Judge
U. S. District Court
Foley Square
N. Y., N. Y. 10007

Re: E.E.O.C. et ano v Kallir, Philips, Ross, Inc.
74 Civ. 3234 - E.W.

Postponement of hearing

Dear Judge Weinfeld:

At 10 A.M. this morning I received a call from the witness we were going to have at the hearing scheduled for tomorrow. He informed me he had just spoken to Brian O'Dwyer and had been told the hearing was postponed until next Monday, January 19th. This was the first I had heard of it.

I called my attorneys' office; however Brian was out and Tom Holman was in a meeting and accepting no calls or messages. Believing that the E.E.O.C. must have been a party to the postponement, I called Philadelphia and learned Paul Contarek knew nothing of it.

When I called my attorneys' office again I spoke to Tom Holman who told me the postponement had been granted last Thursday afternoon over his objections. Since I knew we had answered EPA's interrogatories, I asked why we had not requested a postponement on the grounds that no information had been furnished to us. I was told answers had been received last last week, but I had not been informed of this. Copies are only now being sent to me.

Wasn't I lucky our witness had the courtesy to call me?

Sincerely,

Josephine McGee

cc: B. O'Dwyer, Esq.
T. Holman, Esq.
P. Contarek, Esq.

A-266

O'DWYER & BERNSTIEN

OSCAR BERNSTIEN
(1883-1974)

FRANK DURKAN
LEON HERSHBAUM
JOHN DYRNE
HUGH J. O'ROURKE
LAURA PITCHAL
BRIAN O'DWYER
THOMAS A. HOLMAN

60 WALL STREET
NEW YORK, N. Y. 10005
TELEPHONE BOWLING GREEN 9-9999

January 12, 1976

Josie Mc Cee
309 East 87th Street
New York, New York 10028

Dear Josie:

Enclosed please find a copy of Defendant's Answers to Plaintiff's First Set of Post-Trial Interrogatories.

Also enclosed is a copy of Magistrate Hartenstine's letter of January 9, 1976 granting a final adjournment. To memorialize our conversation of this morning, I did not consent to the adjournment of the case from January 13 to January 19th. I can offer no explaination for this misunderstanding.

Very truly yours,

Thomas A. Holman

THOMAS A. HOLMAN

TAH/MM

UNITED STATES MAGISTRATE A-267
UNITED STATES DISTRICT COURT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N.Y. 10007

CHARLES J. HARTENSTINE, JR.
ROOM 1303

January 9, 1976

Ronald Copeland, Esq.
Equal Employment Opportunity
Commission
26 Federal Plaza, Room 1615
New York, New York, 10007

O'Dwyer & Bernstien
52 Wall Street
New York, New York 10005

Davis, Gilbert, Levine
and Schwartz
500 Fifth Avenue
New York, New York 10036

Saul Cantark, Esq.
Equal Employment Opportunity
Commission
127 N. 4th Street, Suite 200
Philadelphia, Pa. 19106

Re: Equal Employment Opportunity
Commission v. Kallier, Philips,
Ross, Inc. (Josephine McGee)
74 Civ.3234 (W)

Dear Sirs:

At the request of Mr. Patterson for the reason that discovery sought by his client will not be received until Monday, the hearing in this case is adjourned on consent of the attorneys for the intervenor to Monday, January 19, 1976, at 2:00 p.m., in Room 1603 of this building.

This is the final adjournment of this hearing. No further adjournment will be granted, except upon approval of Judge Weinfeld.

Please be sure that this adjournment and the fact that this adjournment is the final one is conveyed to Miss McGee promptly.

Very truly yours,

Charles J. Hartenstine
United States Magistrate

cc: Judge Weinfeld

A-268

30[illegible] East 87 Street
New York, N. Y. 10028
December 29, 1975

Thomas Holman, Esq.
O'Dwyer & Bernstien Assoc.
63 Wall Street
New York, N. Y. 10005

Re: EEOC v. Kallir, Philips, Ross, Inc.
74 Civ. 3234 ([illegible])

Dear Tom:

When I called Brian on Friday, he asked that I work with you on answering the KPR interrogatories. Since I did not participate in the answers which were sent to KPR, and which resulted in the hearing of December 16th, about which I was not advised until it was over, I would appreciate receiving a copy of the interrogatories with the first answers submitted before I begin to supply my answers.

I would also appreciate receiving a copy of the interrogatories which were sent to KPR, which, again were sent without consulting me. The copy which was sent to me has pages missing, and I would appreciate seeing what he asked for.

Brian also mentioned on Friday that some material has been subpoened. Would you please tell me what material that was and when it was subpoened? Brian said it was returnable on the day of the hearing. Since I assume it was sent out before the hearing was again delayed, the material would be returnable on January 6th.

Sincerely,

Josephine McGee

cc: Brian O'Dwyer, Esq.
Paul Gontarek, Esq.
E.E.O.C.

Hon. E. Weinfeld

UNITED STATES DISTRICT COURT A-269

UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007
791-1034, 1035

CHARLES J. HARTENSTINE, JR.
MAGISTRATE
Room 1603

December 23, 1975

Brian O'Dwyer, Esq.
O'Dwyer & Cornstein
63 Wall Street
New York, N.Y. 10005

Re: Equal Employment Opportunity
Commission v. Vallier, Phillips,
Ross, Inc. (Josephine McCue)
74 Civ. 3234 (SW)

Dear Mr. O'Dwyer:

At your request, there being no objections by the other parties, the hearing in this case is adjourned from January 6, 1976 to January 13, 1976 at 10:30 a.m., in Room 1603 of this building.

Very truly yours,

Charles J. Hartenstine
United States Magistrate

cc: E.S. Patterson, Esq.
Paul J. Comiskey, Esq.
Ronald Copeland, Esq.
Miss J. McCue ✓

C
O
P
Y

A-270

O'DWYER & BERNSTIEN

OSCAR BERNSTIEN
(1913-1974)
FRANK DUNKAN
LEON HERSHBAUM
JOHN BYRNE
ROGER M. MORRIS
LAURA FEIGHAL
BRIAN O'DWYER
THOMAS A. HOLOHAN

60 WALL STREET
NEW YORK, N. Y. 10005
TELEPHONE BOWLING GREEN 9-3533

Dec. 22, 1975

Re- EEOC vs. Kallir, Phillips, Ross, Inc.
(74 Civ. 3234) - (EW)

Charles J. Hartenstine
United States Magistrate
United States Courthouse
Foley Square (1603)
New York, N. Y. 10007

Dear Magistrate:

Counsel for the Plaintiff-Intervenor respectfully requests a one-week adjournment of the above matter, presently scheduled for January 6, 1976, at 10:00 A. M.

The attorneys request the adjournment in order to better prepare for the hearing. In addition, we have not yet received the material requested of the Defendant in our Interrogatories and it will take some time to analyze same.

Counsel for the Plaintiff, Counsel for the Defendant and the Plaintiff-Intervenor, Miss J. McGee, have no objections to this request.

Very truly yours,

Brian O'Dwyer

BO'D/mm

cc-- E. Paterson, Esq.
P. Copeland, Esq.
P. Gontarek, Esq.
Miss J. McGee

December 22, 1975

A-271

Hon. Edward Weinfeld
U. S. Federal Court Judge
U. S. District Court
Foley Square
N. Y., N. Y. 10007

Re: E.E.O.C. et ano v Kallir, Phillips, Ross, Inc.
74 Civ. 3234 - E.W.

Dear Judge Weinfeld:

On September 30th, when everyone concerned in the above case was sent by you to Magistrate Hartenstine in order to expedite the financial settlement, it was my impression that it was the duty of all parties, defendant and plaintiff, to follow those instructions. Unfortunately, that has not happened, and I am extremely disturbed by what has and has not been going on.

My attorneys have always known that I want to attend all hearings as a source of information and verification. The first hearing was set for December 2nd. On December 2nd I was the only party to show up since it had been postponed until January 6th, and my attorney, who can contact me at home, failed to do so.

On December 3rd, Paul Contarek, the EEOC lawyer, told me he had not know what the hearing was to have been about.

On December 12th or 13th I received copies of KPR interrogatories and plaintiff's interrogatories. The KPR interrogatories were already answered and returned to the defendant without any consultation with me. My attorney's interrogatories had been compiled and sent to the defendant, also without consulting me.

On December 16th at 5:15 p.m. I received a call from Brian O'Dwyer telling me a hearing had been held that afternoon, attended by everyone but me, although I live five subway stops from the courthouse, certainly closer than Philadelphia, from which the EEOC lawyer must come.

The complete lack of communication with my attorneys concerns me since neither they nor Mr. Contarek are as intimately familiar with the company and personnel as I am. Not informing me of a new hearing date, and not being invited, is, I believe not only discourteous on their part, but dangerous, since they are depriving themselves of a prime source of information.

In spite of this I do not want to replace my attorneys, but since the trial they do not return calls, acknowledge or answer letters, as shown on the attached chronological diary. It appears that after the excitement of a Federal Court trial no one wants to do the dull, detail work necessary to the successful conclusion of the case.

Would it be possible for someone in authority to spell out the responsibilities and duties of attorneys to clients, clients to attorneys, and all parties to the Court before the next scheduled hearing of January 6th?

Respectfully,

Josephine McGee

cc: Brian O'Dwyer, Esq.
Tom Holman, Esq.
Paul Contarek, Esq.

August 1	Decision received
Sept. 22	Applied at Catholic Charities and Hebrew Free Loan Association for loans — no collateral, no loans.
Sept. 23	Court hearing postponed.
September 30	Hearing before Judge Weinfeld, sent to Magistrate Hartenstine.
October 3	Call Brian — busy, does not call back.
October 8	I check trial transcript for Judge's instructions re profit sharing and pension plan, Xerox section, and put on Brian's desk. He is not in.
October 22	Call Brian, don't reach him. Tom Holman tells me he spoke to KPR's attorney and checks will be sent
October 31	To Brian's for checks. Brian and Tom out of office. Bank manager tells me how to endorse checks.
November 7	Call Brian, not in.
November 11	Call Holman re explanation for checks, not in.
November 12	Call Brian, not in; in p.m. call Brian's home, not in, leave message.
November 13	Call Magistrate Hartenstine's office, told to call next week re date of hearing.
November 20	Called Brian re hearing date — set for Dec. 2nd.
November 21	I wrote Judge Weinfeld
December 2nd	I show up for postponed hearing

P. S. If anyone other than those already listed should receive copies of this letter, I will be glad to send them if your secretary will let me know, or, if it will facilitate matters, she has my permission to send copies as she feels necessary.

UNITED STATES DISTRICT COURT
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N.Y. 10007
791-1084, 1085

CHARLES J. HARTENSTINE, JR.
MAGISTRATE
Room 1603

A-273

December 17,1975

Ms. Josephine McGee
309 East 87th Street
New York, N.Y. 10028

Re: Equal Employment Opportunity
Commission v. Kallier, Philips,
Ross, Inc. (Josephine McGee)
74 Civ. 3234 (EW)

Dear Ms. McGee:

You handed me your letter of December 17, 1975, today.

I can appreciate your anxiety; but you must understand that it is not proper for me to correspond with you directly when you are represented by counsel of your own choice, when your interests are also the concern of the Equal Employment Opportunity Commission, the plaintiff that commenced this action, and when the attorneys for the defendant are not aware of your communications to me.

Please inform your attorneys of the problems you see. I would think they would be able to advise you of the current status of this case, and why, without comment from me.

Very truly yours,

C. J. Hartenstine

Charles J. Hartenstine
United States Magistrate

cc: Paul J. Gontarek, Esq.
Ronald Copeland, Esq.
O'Dwyer & Bernstien, Esqs.
Davis, Gilbert, Levine &
Schwartz, Esqs.

A-274

[illegible]
New York, N. Y. 10028
December 17, 1975

Hon. Charles J. Hartenstine
U. S. Magistrate
Foley Square
N. Y., N. Y. 10007

Re: E.E.O.C. et ano v Kallir, Philips, Ross, Inc.
74 Civ. 3234 - S. D. N. Y.

Dear Judge Hartenstine:

It has happened again! As you recall, I was not informed by my attorney that the December 2nd hearing had been postponed, and therefore I was the only person to show up in your chambers. It is bad enough to be made to look like a fool -- but worse when it costs me a dollar in transportation.

Now another hearing -- not previously scheduled -- was held yesterday. I was not informed until it was over, and a ruling was made which would indicate that you, too, are not being told everything.

Brian told me that the only salary, raises, and bonus information we are not to receive is that concerning the president, John Kallir, and company vice presidents. If I had been there I could have informed you that almost everyone at my level when I was terminated has been made a vice-president. When I mentioned this ruling last night to the only Certified Public Accountant I could get who would keep himself on call regarding this case, he said information regarding other employees would be irrelevant.

We understood my back pay would include the normal raises and bonuses given to what would broadly be termed my peers. Since those who have not left, voluntarily or involuntarily, are all vice-presidents, we must have the information we requested about them in order to comply with Judge Weinfeld's decision (granted, my interpretation). *

Regarding John Kallir's salary, the CPA tells me it is not an uncommon practice for officers of a company -- in years when profits are not so large as usual -- to give themselves raises and bonuses equal to the existing profits and tell employees there were no profits that year. Since this statement was made to employees one of the year after I was fired, he felt it should be checked for accuracy. The E.E.O.C. lawyer explained it this way. I am entitled to benefits received by others. If they did not receive profit sharing benefits, I am not entitled to them -- even if Mr. Kallir absconded with every cent. To my layman's mind this is like saying: if everyone is told a lie, no one should be told the truth. When I pointed this out to Mr. Conterek, I received the side-step, slide response which must be a required course every year in law school.

* Strangely, Kallir, Philips, Ross, Inc. furnished salary information on most of these people in pre-trial interrogatories; now they claim some sort of retroactive executive privilege for them?

A-275

You must certainly want to base your recommendation on complete and accurate information; however these hearings appear to be becoming Star Chamber procedures. I did not see any interrogatories before they were sent out, and I was only informed after the fact about answers to Kiff's interrogatories.

All lawyers concerned with the case, and the defendants, have other sources of income and have been able to take vacations to get away from it. For three years I have lived in poverty with this case hanging over my head with no relief.

In the words of Job:

> What strength have I that I should endure?
> And what is my limit that I should be patient?
> Have I the strength of stones, or is my flesh
> of bronze? Have I no helper, and has advice
> deserted me?

Respectfully,

Josephine McGee

cc:

Hon. Edward Weinfeld

A-276

309 East 87 Street
N. Y., N. Y. 10028
November 21, 1975

Hon. Edward Weinfeld
U. S. Federal Court Judge
U. S. District Court
Foley Square
N. Y., N. Y. 10007

Re: E.E.O.C. et ano v Kallir, Philips, Ross, Inc.
74 Civ. 3224 - E.W.

Dear Judge Weinfeld:

After reading your decision in my case in July of this year I did not think that in November I would still have not received any information on payroll, raises, etc., on which to begin estimating my back pay and benefits.

For two years, from filing the first charge until the case was filed in Federal Court, I had no personal attorney and yet managed to accomplish what I was told could not be done: convince the E.E.O.C. to take the case of one person to court. I was then advised by the EEOC to obtain a personal attorney. Both Brian O'Dwyer and Tom Bolton were very supportive up to and including the trial, but since then no progress has been made, and my personal situation has continued to deteriorate.

In the almost three years since this action was begun it has been necessary for me to borrow almost $10,000. from friends and relatives in sums that vary from $50. to $1,000. -- and many of them have themselves been impoverished into poverty. From March until last week my phone was disconnected. My neighbors gave me clothes, and I'm grateful to get them! I discovered I was not eligible for welfare or food stamps because your decision was considered as good as money in the bank; but banks did not consider the decision collateral, and I cannot borrow against it. In order to live I was forced to accept $1,000. from my 87-year old aunt's "coffin money." Immigrants did not buy insurance, and she has saved $3,000 to be buried with -- and I had to take one-third of it.

I became so depressed and incensed that I forced my attorneys to request my pension plan and profit sharing benefits -- as you had pointed out during the trial in June. The attached correspondence is self-explanatory. I received no acknowledgement or answer to my letter of November 1st. With my rent, food, medical and other expenses, the money I received cannot last long.

Magistrate Hartenstine has set a date for a hearing, which I learned about from him, not my lawyers, but we are still completely unprepared.

I would appreciate anything you can do to see that my attorneys do what is necessary to obtain the records. My former employer has only some 60 employees, and the payroll is on computers, so a print-out should be available almost immediately. I hope I am to be present at the hearing since I am the only one with knowledge of personnel practices at KPR.

Respectfully,

Josephine McGee

cc: Magistrate Hartenstine

Enc. 7

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	Judge Weinfeld 74 Civ 3234
- against -	
KALLIR, PHILLIPS, ROSS, INC., a New York Corporation, Defendant,	OPPOSING AFFIDAVIT
JOSEPHINE McGEE, Movant.	

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

NORMAN COOPER, being duly sworn, deposes and says:

I am an officer of defendant corporation, to wit: its Executive Vice President, and am fully familiar with all of the facts and circumstances surrounding the within matter, and make this affidavit in opposition to an application by Josephine McGee, movant, to obtain interlocutory relief requiring defendant corporation to reinstate the said movant to employment with the defendant pendente lite.

Your deponent believes that a brief history of this matter would be of assistance to the Court in reaching a just and equitable decision relative to the instant application.

The movant was employed by defendant on or about May 15, 1967 as an Administrative Assistant with a salary of $8,000 per annum. At the time of her employment she had not had extensive experience in the advertising field. There could be no question that the movant was, and is an extremely intelligent individual who, through hard work and application, acquired the expertise necessary to perform the functions of an Advertising Account Executive within a relatively short period after her initial employment by the defendant. On or about September 15, 1970, the movant was promoted to Account Executive and her salary was increased to $12,500.00 per annum. She performed the function of this position in a satisfactory manner and accordingly, about a year later, on August 15, 1971, her salary was increased to $15,000 per annum. Due to the responsibilities she had undertaken in the position of Account Executive and the direct client contact she had as a result thereof, defendant promoted her to Senior Account Executive on May 15, 1972 and increased her salary to $18,000 per annum. This latter promotion was unique within the defendant's corporate structure, in that the movant, at that time, had responsibility for only one account of the defendant, whereas each of the other Senior Account Executives then employed by defendant, had responsibility for more than one account and each of them had a minimum of ten

Record Appt-
acct

years experience in the advertising field in positions which were related to the area of the services they were performing for the defendant.

Approximately six months after her last promotion and salary increase, the movant orally communicated with the President of defendant corporation seeking a further, substantial salary increase effective immediately. She took the posture that as a Senior Account Executive, she was entitled to a salary equal to that paid other Senior Account Executives then in the employ of defendant. She took this position despite the aforementioned fact that each of her counterparts employed by the company were then supervising multiple accounts, whereas the movant was supervising but one account. The President of the corporation did not object to the salary increase requested on that basis, however, but merely indicated to the movant that normal company policy, then in effect with respect to all employees, was to reserve decisions relative to salary increases to a meeting of the defendant's senior executives on or about the anniversary date of the employee's hiring. He stated that prompt consideration would thus be given to her request at a meeting of this group in or about April, 1973.

Movant, apparently dissatisfied with the response of the defendant's President aforesaid, filed a discrimination claim with the New York City Commission of Human Rights, alleging that the defendant had unlawfully discriminated against her on the

basis of sex. This complaint was filed on December 15, 1972. Thereafter, proceedings were held relative to this charge and during this period the movant continued in defendant's employ performing the same functions and at the same salary that she had prior to the filing of her discrimination claim. No action of any nature was taken directly by the defendant against the movant during this period, nor, in fact, does the movant claim that she was subject to any retaliation or harrassment by the defendant for some months after the charge aforesaid was filed. During the months following the filing of said charge, the movant began to conduct a campaign directed at the employees of the account she was supervising, to obtain letters and statements of commendation as to her proficiency, for the purpose of gathering documentary evidence to introduce in support of her filed grievance with the Human Rights Commission of the City of New York." Word of this course of conduct was received by various officers of defendant corporation in the early months of 1973 and these reports included the strong implication that the defendant's client, who was being solicited, was to say the least, displeased with being brought into an internal problem of defendant's agency. At this time, the movant was orally requested to cease and desist from this course of conduct, as the corporate officers verily believed that such conduct was jeopardizing its relationship with its client; an account that represented a

substantial portion of defendant's gross business. The movant refused this request and her pursuit of such information and evidence continued. The responsible officers of the defendant came to the conclusion in March, 1973 that solely in the interests of protecting a valuable portion of its business, the movant should be placed on a paid leave of absence pending the conclusion of her grievance proceedings and on March 27, 1973 this decision was effected.

During the month following the commencement of her leave of absence with pay and benefits, it became apparent that defendant's difficulties with the movant's behavior were no closer to a satisfactory resolution, and that the defendant was, by continuing the movant at full salary and benefits, in effect, financing a war against itself. Accordingly, the responsible executives of the corporation terminated salary payments to the movant effective May 15, 1973 and her medical benefit plans which were furnished by the defendant lapsed as of June 14, 1973.

At about this period of time, the movant filed the aforesaid charges with the Federal Equal Employment Opportunity Commission. To her charge of sex discrimination she had by this

time added the charge of retaliation, based upon her grievance theretofore filed with the New York City Human Rights Commission.

As provided by the applicable Federal laws, the plaintiff herein conducted conciliation proceedings, the result of which was (a) effective dismissal of the sex discrimination charge; and (b) a demand upon defendant to enter into a consent decree in connection with the charge of retaliation.

Our attorneys advised us that the uniform practice of the plaintiff in cases of this nature is to offer an employer charged with violations of Title VII of the Civil Rights Act an opportunity to enter into a consent decree, which is tantamount to an admission of guilt or in the alternative to defend its practices before the appropriate United States District Court. After careful consideration of the issue involved, the defendant elected to refuse the offer to enter into a consent decree on the ground that it could not admit guilt of a violation it had not committed, and shortly thereafter, the instant suit was commenced by the Equal Employment Opportunity Commission.

Although this action was commenced by the filing and service of a summons and complaint on or about July 26, 1974, our attorneys advised us that the movant made no attempt to intervene or participate therein until the instant application was made to this Court on December 9, 1974.

The moving papers herein, seek an order directing reinstatement of the movant to her former employment with defendant

on the ground that she is destitute and in need of medical care. Our attorneys advise us that the moving papers are wholly deficient in law and in fact to support the application and a memorandum of law is submitted herewith in support of that position.

The thrust of the moving papers directs this Court's attention to the financial and physical plight of the movant, with which all concerned can sympathize. It is incredible, however, to assume that the defendant, or for that matter, any employer has an obligation to support an employee or a former employee solely on the basis of her personal need. There is no attempt or showing of any effort by the movant during the year and one half following the termination of her employment with defendant, to obtain a new position in the field in which she is qualified. By her own affidavit she admits to having been employed for only one and one half weeks during this 18 month period and then only as a typist; a position which is far below her level of competence and experience. By virtue of the fact that the defendant has never received a request from another advertising agency or similar organization for references concerning the movant's employment and performance, and the absence of any claim to the contrary in the moving papers, it is clear that the movant has made no attempt to obtain employment in the field in which she is qualified during the 18 months of her unemployment.

The extraordinary remedy herein sought, if granted by this Court, would be wholly inequitable and impose a severe burden upon the defendant. The moving papers make no claim that Ms. McGee is disabled or in any other way incapable of finding employment, and clearly seek to impose an unwarranted penalty upon this defendant which has no basis in law or fact. An order reinstating the movant would permit her to continue her disruptive course of conduct under the color of this Court's approval. The severe consequences which could result (i.e. defendant's loss of a valued client), far outweigh the questionable equities of movant's emotional plea.

It is respectfully requested, therefore, that the instant application be denied in all respects.

Sworn to before me this
12th day of December, 1974.

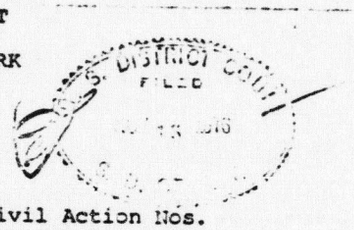
LOWARD S. F[illegible]
Notary Public, State of New York
No. 31-0291115
Qualified in New York County
Commission Expires March 30, 1975

NORMAN COOPER

Judgment Appealed From

A-286

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF NEW YORK



EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

and

JOSEPHINE McGEE,

Plaintiff-Intervenor,

v.

KALLIR, PHILIPS, ROSS, INCORPORATED,

Defendant.

Civil Action Nos.

74 Civ. 3237 (EW)
75 Civ. 401 (EW)

77,070

ORDER AND JUDGMENT #77,020

Upon consideration of all pleadings, evidence and arguments of counsel in the above-captioned matter,

IT IS HEREBY ORDERED that Defendant Kallir, Philips, Ross, Incorporated, shall pay to Plaintiff-Intervenor Josephine McGee damages in the amount of $94,998.98, consisting of the following: $65,912.10 as back wages since her discharge together with the medical expenses which she has incurred since her discharge and which would have been recoverable under Defendant's major medical policy, less interim earnings and unemployment compensation benefits; $6205.50 as interest computed at the rate of 6% per year compounded quarterly; and $22,881.38 as one year's additional salary in lieu of reinstatement.

Plaintiff was within 10 days to defendant may for allowance of

IT IS FURTHER ORDERED that ~~Defendant~~ pay the attorney's fees incurred by ~~McGee~~ her.

Any other relief requested by either Plaintiff or Plaintiff-Intervenor is hereby denied.

Accordingly judgment shall be entered for the Plaintiffs with costs to be taxed.

Dated: New York, New York
November 12, 1976

EDWARD WEINFELD
United States District Judge

JUDGMENT ENTERED - 11/15/76
Raymond F. Burghardt
CLERK

Notice of Appeal

4-27

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff,	:	Civil Action Nos.
and	:	74 Civ. 3232 (EW)
JOSEPHINE McGEE,	:	75 Civ. 401 (EW)
Plaintiff-Intervenor,	:	NOTICE OF APPEAL
- against -	:	
KALLIR, PHILIPS, ROSS, INCORPORATED,	:	
Defendant.	:	

Notice is hereby given that Kallir, Philips, Ross Incorporated defendant above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the order and judgment granted in favor of the plaintiff-intervenor, Josephine McGee, dated November 12, 1976 and entered on November 15, 1976.

DAVIS & GILBERT

By /s/
Patricia Hatry, A Member of the Fi
Attorneys for Defendant
500 Fifth Avenue
New York, New York 10036
(212) 564-3530

SOUTHERN DISTRICT OF NEW YORK

A-288

Original filed Jan 10, 1977 SDNY

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,	)	
Plaintiff,	)	
and	)	
JOSEPHINE MC GEE,	)	Civil Action Nos.
Plaintiff-Intervenor,	)	74 Civ. 3234 (E.W.)
v.	)	75 Civ. 401 (E.W.)
KALLIR, PHILIPS, ROSS, INCORPORATED,	)	
Defendant.	)	

NOTICE OF CROSS-APPEAL

TO: Brian O'Dwyer, Esquire
O'Dwyer & Bernstien
63 Wall Street
New York, New York 10005
Attorney for Plaintiff-Intervenor Josephine McGee

Davis & Gilbert, Esquires
500 Fifth Avenue
New York, New York 10036
and
Martin Mushkin, Esquire
Philips & Mushkin
360 Lexington Avenue
New York, New York 10017
Attorneys for Defendant Kallir, Philips, Ross, Inc.

Notice is hereby given that the Equal Employment Opportunity Commission, the above-named Plaintiff, hereby cross-appeals to the United States Court of Appeals for the Second Circuit from the Final Order and Judgment entered in this action on the 15th day of November, 1976.

Dated: January 6, 1977.

DELORES WILSON
Assistant General Counsel

Local Counsel of Record

FRANK J. TUK
Supervisory Trial Attorney

RONALD G. COPELAND
Regional Counsel
New York Regional Office

PAUL J. CONTAREK
Trial Attorney

Notice of Cross-Appeal, Plaintiff-Intervenor

A-289

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

- and -

JOSEPHINE McGEE,

Plaintiff-Intervenor,

- against -

KALLIR, PHILIPS, ROSS, INCORPORATED,

Defendant.

NOTICE OF CROSS-AP

Civil Action Nos.

74 Civ. 3232 (EW)

75 Civ. 401 (EW)

Notice is hereby given that JOSEPHINE McGEE, Plaintiff-Intervenor above named, hereby cross-appeals to the United States Court of Appeals for the Second Circuit from the order and judgment granted in favor of the plaintiff-intervenor, JOSEPHINE McGEE, dated November 12, 1976, and entered on November 15, 1976.

O'DWYER & BERNSTIEN
Attorneys for Plaintiff-Intervenor
63 Wall Street
New York, NY 10005
212-269-3939

Amended Notice of Cross-Appeal, Plaintiff-Intervenor

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A-290

Original filed
12-16-76
USDC

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Plaintiff,

- and -

JOSEPHINE McGEE,

Plaintiff-Intervenor,

- against -

KALLIR, PHILIPS, ROSS, INCORPORATED,

Defendant.

PLAINTIFF-INTERVENOR'S AMENDED NOTICE OF APPEAL

Civil Action Nos.

74 Civ. 3232 (EW)

75 Civ. 401 (EW)

S I R S :

PLEASE TAKE NOTICE, that the Plaintiff-Intervenor JOSEPHINE McGEE, hereby cross-appeals to the United States Court of Appeals for the Second Circuit from an Order and a Judgement, dated November 12, 1976, and entered in the Office of the Clerk on November 15, 1976, granted in favor of the Plaintiff-Intervenor, and this Cross-Appeal is from each and every part of the said Order and Judgement aforementioned, and from the whole thereof.

O'DWYER & BERNSTIEN, ESQS.
Attorneys for Plaintiff-
Intervenor
63 Wall Street
New York, NY 10005
212-269-3939

By: BRIAN O'DWYER, a
member of the firm.

RONALD COPELAND, ESQ.
Regional Counsel
New York Regional Office
Equal Employment Opportunity
Commission
26 Federal Plaza - Room 1615
New York, NY 10007
212-264-3640

DAVIS & GILBERT, ESQS.
Attorneys for Defendant
500 Fifth Avenue
New York, NY 10036
212-564-3530

Office of the Clerk
United States Court of Appeals
for the Second Circuit
Foley Square, NY

United States District Court
Southern District of New York
Foley Square, NY

ABNER W. SIBAL, ESQ.
General Counsel
EQUAL EMPLOYMENT OPPORTUNITY
COMMISSION
Philadelphia Regional Office of
General Counsel
127 N. Fourth Street - Suite 200
Philadelphia, PA 19106
215-597-0882

EEOC Amended Charge of Discrimination

A-292

AMENDED

CHARGE OF DISCRIMINATION

(If you have a complaint, fill in this form and mail it to the Equal Employment Opportunity Commission's Regional Office in your area. In most cases, a charge must be filed with the EEOC within a specified time after the discriminatory act took place. IT IS THEREFORE IMPORTANT TO FILE YOUR CHARGE AS SOON AS POSSIBLE.

This form is to be used only to file a charge of discrimination based on RACE, COLOR, RELIGION, SEX, or NATIONAL ORIGIN.

Case File No. TPY 3-1445

(PLEASE PRINT OR TYPE)

1 Your Name (~~Mr., Mrs.~~, Miss) (Indicate) Josephine Anne McGee Phone Number TE1-5243

Street Address 305 East 87 Street

City NY State NY Zip Code 10028

2 WAS THE DISCRIMINATION BECAUSE OF: (Please check one)

Race or Color ☐ Religious Creed ☐ National Origin ☐ Sex ☑ Female

3 Who discriminated against you? Give the name and address of the employer, labor organization, employment agency and/or apprenticeship committee. If more than one, list all.

Name Kallir, Philips, Ross, Inc

Street address 919 Third Avenue

City NY State NY Zip Code 10022

AND (other parties if any)

4 Have you filed this charge with a state or local government agency? Yes ☑ When 12 (MONTH) 15 (DAY) 72 (YEAR) No ☐

5 If your charge is against a company or a union, how many employees or members? Under 25 ☐ Over 25 ☑

6 The most recent date on which this discrimination took place: Month continuing Day and 15 Year 1973

7 Explain what unfair thing was done to you. How were other persons treated differently? (Use extra sheet if necessary.)

I was discriminated against in the area of wages, benefits, terms & conditions and promotions. After filing with the New York City Commission on Human Rights I was retaliated against in violation of Section 704(A) of Title 7 by being discharged.

8 I swear or affirm that I have read the above charge and that it is true to the best of my knowledge, information and belief.

Date 6/14/73 Josephine Anne McGee (Sign your name)

Subscribed and sworn to before me this 14th day of June 1973

Hannah Walker (Name) Equal Employment Officer (Title)

If it is difficult for you to get a Notary Public to sign this, sign your own name and mail to the Regional Office. The Commission will help you to get the form sworn to.

FORM APP.: BUR. OF BUDGET—No. 124-R0001

FORM EEOC-5 (REV. 7-68)

EEOC Receipt for Copy of Charges

(A-293 (

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE
26 FEDERAL PLAZA, ROOM 4007
(At Foley Square)
NEW YORK, NEW YORK 10007
264 - 3840

NAME & CHARGE NUMBER

JOSEPHINE McGEE — TNY 3-1445

VS.

KALLIR, PHILIPS, ROSS, INC.
RESPONDENT

RECEIPT FOR COPY OF CHARGE(S)

I hereby acknowledge receipt of a copy of the charge(s) identified above alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, from Keziah Walker, a representative of the Equal Employment Opportunity Commission, at 919 Third Avenue - NY NY
(Address - Including City & State of Respondent)

The signing of this receipt does not constitute admission of any violation of Title VII or of any other law.

Theodore A Kaufman
Signature

Atty for Respondent
Title

7/12/73
Date

I certify that I personally delivered a copy of the charge(s) identified above to Mr. Theodore Kaufman - Attorney
(Name & Title)
on the date and place stated above.

Keziah Walker
Representative --- EEOC

You are urged to submit a written statement of your position and any additional evidence with respect to these allegations. Your statement and evidence will be incorporated into the Investigator's final report and will be fully considered in the Commission's determination.
(NOTE: Title VII, Section 704(a) of the Civil Rights Act of 1964 states that it shall be an unlawful employment practice for an employer or other respondent to discriminate against any idividual because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding or hearing under Title VII).

B-5

Determination of EEOC

A-294 Case file

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
NEW YORK DISTRICT OFFICE
26 FEDERAL PLAZA, ROOM 4002
(At Foley Square)
NEW YORK, NEW YORK 10007
264 - 3840

Josephine McGee
309 East 87th Street
New York, New York

Charge No. TNY 3-1445
Case No. YNY 4-073

Charging Party

vs.

Kallir, Philips, Ross, Inc.
919 Third Avenue
New York, New York

Respondent

DETERMINATION

Under the authority vested in me by Section 1601.19b(d) of the Commission's Procedural Rules, 37 FR 188 (p. 20165) (September 27, 1972), I issue on behalf of the Commission, the following Determination as to the merits of the subject charge.

Respondent is an Employer within the meaning of Title VII of the Civil Rights Act of 1964, as amended and the timeliness and all other jurisdictional requirements have been met.

It is undisputed that on December 8, 1973, Charging Party directed a memorandum to Respondent requesting a salary increase which would be "commensurate with" the title of Senior Account Executive and equal to the salary received by other employees with similar titles. Charging Party quoted provisions from the "Law of Human Rights" within the body of the memorandum.

On December 13, 1972, Respondent answered Charging Party's memorandum, requesting salary increase, by stating that the agency's Executive Committee would review her on the anniversary of her employment date. On the same date, December 13, 1972, Charging Party filed a charge of employment discrimination with the New York City Commission on Human Rights, against Respondent.

It is also undisputed that on March 13, 1973, the New York City Commission on Human Rights held an investigatory conference with Respondent and Charging Party. On March 26, 1973, Respondent wrote Charging Party a letter relieving her of all her responsibilities, asking her not to return to work until further notice, and stating that her salary would be continued.

Respondent's explanation for such action was the "protracted" nature of the City Commission's hearing and Charging Party's "divisive behavior" which allegedly was causing difficulties in carrying out the company's business. On March 26, 1973, Charging Party filed a charge of retaliation, against Respondent, with the New York City Commission on Human Rights.

It is further undisputed that a memorandum, dated March 27, 1973, written by one Respondent's officials to its staff states: "So far, there's been only one fact finding session in this matter, which was adjourned after three hours, and no decision has as yet been made whether the case warrants a hearing. While these procedures drag on, we saw no reason at first why they should interfere with Josie's role in the agency. Increasingly, though, Josie has taken actions which can prove detrimental to our relationship with (_____). The agency-client relationship is so sensitive and dependant on complete mutual trust that we cannot allow it to be undermined through divisiveness or personal rancor. Thus, she left us no choice but to act as we did".

On April 23, 1973 Charging Party filed a charge of employment discrimination, against Respondent, with the Equal Employment Opportunity Commission. On May 15, 1973, Respondent notified Charging Party that her checks would be discontinued.

Charging Party alleges that Respondent discriminated against her by denying her equal wages, benefits, terms and conditions and promotions because of her sex (female) and finally discharged her in retaliation of her having filed a charge of discrimination with the New York Commission on Human Rights.

Respondent denies the allegation of retaliation and answers that Charging Party caused trouble with the client and her fellow employees. According to Respondent, the agency complained to the New York City Commission on Human Rights about Charging Party's action and was told that the City Commission had the power only to restrain a Respondent from retaliating and not a complainant. Therefore, upon the advice of the agency's attorney, Respondent informed Charging Party that it was discontinuing her checks.

An employer cannot discriminate against an employee because he or she makes a complaint alleging discriminatory treatment. Complaints regarding discrimination are protected even when they are completely unfounded. On the basis of sequence of events and evidence presented above, the Commission finds it reasonable to conclude that Respondent has retaliated against Charging Party because of its displeasure at her protests. Such retaliation constitutes a violation of Section 704(a) of Title VII.

A-296

There is insufficient evidence to determine the validity or invalidity of Charging Party's allegation of discriminatory terms and conditions of employment nor does the record support Charging Party's remaining allegations.

Having determined that there is reasonable cause to believe the charge of retaliatory discharge is true, the Commission now invites the parties to join with it in a collective effort toward a just resolution of this matter. A representative of this office will be in contact with each party in the near future to begin the conciliation process.

On Behalf of the Commission:

24 September 1973
Date

Daniel Murnane Mackey
District Director

Letter from EEOC to Defendant dated
January 31, 1974

A-297

JAN 31 1974

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Kallir, Philips, Ross, Inc.
919 Third Avenue
New York, New York

Re: Josephine McGee vs. Kallir, Philips, Ross, Inc.
Case No. YNY 4-073

Dear Sir or Madam:

This will confirm the results of our conciliation efforts on the above-referenced case. The Commission considers its efforts at conciliation of this matter have failed.

We shall continue to process this case in accordance with Commission procedures. You will be advised of further developments as they occur.

Very truly yours,

Ralph Munoz,
District Counsel

cc:
case file
reading file

RECEIPT FOR CERTIFIED MAIL—30¢ (plus postage)

No. 292044

SENT TO	POSTMARK OR DATE
Kallir, Philips, Ross, Inc.	
STREET AND NO.	
919 Third Avenue	
P.O., STATE AND ZIP CODE	
New York, New York	

OPTIONAL SERVICES FOR ADDITIONAL FEES

RETURN RECEIPT SERVICES
1. Shows to whom and date delivered ..... 15¢
With delivery to addressee only ..... 65¢
2. Shows to whom, date and where delivered ..... 25¢
With delivery to addressee only ..... 85¢

DELIVER TO ADDRESSEE ONLY ..... 30¢
SPECIAL DELIVERY (extra fee required) .....

PS Form 3800 Apr. 1971 — NO INSURANCE COVERAGE PROVIDED— NOT FOR INTERNATIONAL MAIL — (See other side) — GPO : 1973 O - 488-743

Jan 1.7 ¢/.

Letter from Defendant's Attorneys to
EEOC dated January 10, 1974

C. 4-298 C

A. M. Davis (1900-1972)
A. M. Gilbert
Joshua Levine
Philip K. Schwartz
Patricia Hatry
Theodore A. Kaufman
Philip S. Reiss
Paul B. Gibney, Jr.
Ross L. Gilbert
Leonard Orbin
Solomon P. Friedman
Martin A. Rennitz
Gerald B. Schwartz
Miles Baum
Alan D. Kroll
Stuart Lee Friedel
Michael D. Ditzian

DAVIS, GILBERT, LEVINE & SCHWARTZ

500 Fifth Avenue, New York, N.Y. 10036

Howard P. Peck
Counsel

Cable Address
"Davanoil"

Telephone
Area Code 212
564-0300

E.E.O.C.
RECEIVED
JAN 11 1974
N.Y. DIST. OFFICE

January 10, 1974

Mr. Stephen A. Mitchell
United States Equal Employment Opportunity Commission
90 Church Street
New York, N.Y. 10007

Re: Case No. YNY 4-073
McGee vs. Kallir, Philips, Ross, Inc.

Dear Mr. Mitchell:

This will confirm the concession made by our client at the conciliation hearing in the above matter.

Notwithstanding that there was a finding that the employer did not discriminate and notwithstanding that the employer does not concede that the charge of retaliatory discharge is correct, our client makes the following offer in the spirit of conciliation and without prejudice.

Our client is willing to treat Miss McGee as though she were an officer of the corporation who was leaving the organization, and grant her 3 months severance pay, plus whatever was credited to her account as her vested share in the company's profit sharing and pension plans as of May 30, 1973.

I repeat that this offer is made in the spirit of conciliation and because of your efforts in this matter. However, it should be clearly understood that we do not consider the amount offered being subject to further negotiation, but feel that the concession offer is an eminently fair one under all the circumstances.

In addition, our client is still willing, as it had offered, to help Miss McGee to find suitable employment.

I call your attention to the fact that the conciliation agreement is supposed to contain a clause whereby both parties agree to make no reference to the proceedings.

Thank you for your courtesies. We await your early reply.

Sincerely,

Theodore A. Kaufman

TAKaufman/aw
cc: Kallir, Philips, Ross, Inc.

Letter from EEOC to Defendant's Attorneys
dated January 21, 1974

A-299

90 Church St., Rm. 1301

264-7161

CERTIFIED MAIL NO. 291986

January 21, 1974

Theodore A. Kaufman, Esq.
Davis, Gilbert, Levine & Schwartz
500 Fifth Avenue
New York, New York 10036

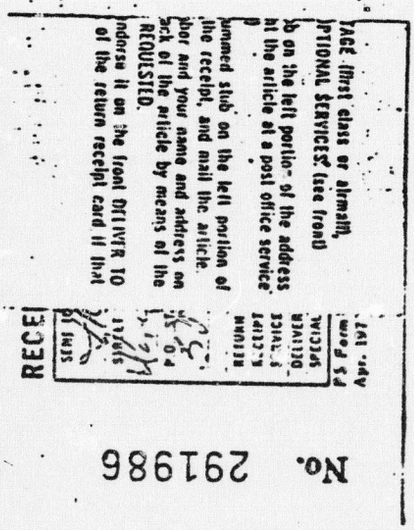
Re: McGee v. Kullir, Phillips, Ross, Inc.
Case No. YNY 4-073

Dear Mr. Kaufman:

Your letter of January 10, 1974 indicates your refusal to enter into a conciliation agreement. In accordance with Section 1601.23 of the Commission's Procedures and Regulations, this Commission is terminating its efforts to conciliate and will not resume such negotiations unless you specifically request resumption in writing within ten (10) days.

Sincerely,

/s/
Freddie D. Holt
Deputy District Director



Letter from Defendant's Attorneys to EEOC
dated January 30, 1974

(A-300 (

A. M. Davis (1906-1972)
A. M. Gilbert
Joshua Levine
Philip K. Schwartz
Patricia Hatry
Theodore A. Kaufman
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Stuart Lee Friedel
Michael D. Ditzian

DAVIS, GILBERT, LEVINE & SCHWARTZ

500 Fifth Avenue, New York, N.Y. 10036

Howard P. Pecz
Counsel

Cable Address
"Davangil"

Telephone
Area Code 212
564-3590

E.E.O.C.
RECEIVED
JAN 31 1974
N.Y. DIST. OFFICE

January 30, 1974

Mr. Freddie D. Holt,
Deputy District Director
Equal Employment Opportunity Commission
90 Church Street, Rm. 1301
New York, New York

Re: McGee vs. Kallir, Philips, Ross, Inc.
Case No. YNY 4-073

Dear Mr. Holt:

We take exception to your letter of January 21, 1974 addressed to the undersigned.

Our client did not refuse to enter into any conciliation agreement, and we believe that any impartial person would consider its offer to be a fair one.

As a matter of fact, the attitude of the complainant in demanding $26,000 and then making her "final offer" of $25,000, as relayed to me by Mr. Mitchell, indicates that it is the complainant who refuses to conciliate.

Inasmuch as Mr. Mitchell has advised us that Miss McGee will be commencing her own lawsuit, it will probably be preferable to leave matters as they are.

Very truly yours,

TAKaufman/aw
cc: Kallir, Philips, Ross, Inc.

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

ALLEN Q HAYES, being duly sworn, deposes and says that deponent is not a party to the action, is over 18 years of age and resides at 162 Navy Walk Apt 6A Brooklyn N.Y. 11201.

That on the 24 day of FEBRUARY, 1977, deponent personally served the within JOINT APPENDIX upon the attorneys designated below who represent the indicated parties in this action and at the addresses below stated which are those that have been designated by said attorneys for that purpose.

By leaving 1 true copy of same with a duly authorized person at their designated office.

~~By depositing _____ true copies of same enclosed in a postpaid properly addressed wrapper, in the post office or official depository under the exclusive care and custody of the United States post office department within the State of New York.~~

Names of attorneys served, together with the names of the clients represented and the attorneys' designated addresses.

1 RONALD COPELAND
REGIONAL COUNSEL
NEW YORK REGIONAL OFFICE
EQUAL EMPLOYMENT OPPORTUNITIES COMMISSION
ATTORNEY FOR PLAINTIFF-APPELLEE-APPELLANT
26 FEDERAL PLAZA - Room 1615
NEW YORK, N.Y. 10007

2 O'DWYER + BERNSTEIN
ATTORNEYS FOR PLAINTIFF-INTERVENOR-APPELLEE-APPELLANT
63 WALL ST.
NEW YORK N.Y. 10005

Allen Q Hayes

Sworn to before me this
24 day of February, 1977

Michael DeSantis

MICHAEL DeSANTIS
Notary Public, State of New York
No. 03-0830908
Qualified in Bronx County
Commission Expires March 30, 19[illegible]